No. 90-5672-CFX
Status: DECIDED

Title: Rick Dean Bressman, et al., Petitioners
v.
Hal Farrier, et al.

Docketed:
August 28, 1990

Court: United States Court of Appeals
for the Eighth Circuit

See also:
90-5854

Counsel for petitioner: Mears,Philip B.

Counsel for respondent: Lindebak,Layne, Allen,Gordon E.

Entry	Date	Note	Proceedings and Orders
1	Aug 28 1990	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Oct 11 1990		DISTRIBUTED. October 26, 1990
4	Oct 18 1990	P	Response requested -- JPS. (Due November 17, 1990)
5	Nov 16 1990		Brief of respondents in opposition filed.
6	Nov 21 1990		REDISTRIBUTED. December 4, 1990
7	Jan 3 1991		REDISTRIBUTED. January 18, 1991
9	Feb 1 1991		REDISTRIBUTED. February 15, 1991
11	Feb 15 1991		REDISTRIBUTED. February 22, 1991
13	Feb 25 1991		Petition DENIED. Dissenting opinion by Justice White with whom Justice O'Connor joins. (Detached opinion.)

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EDITOR'S NOTE

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RONALD W. BREWER)
Respondent,)
vs.)
JOHN HENRY, SARAH COATS,)
JAMES BURTON)
Petitioners.)

ORIGINAL

CHARLES O. REESE,)
Respondent,)
vs.)
HAL FARRIER, CRISPUS NIX,)
HEDGEPETH, JOHN HENRY, RON)
WELDER, CHARLES HARPER,)
Petitioners.)

CHESTER WALTON Jr.)
Respondent,)
vs.)
CRISPUS NIX, CHARLES HARPER,)
LT. SHIP, RONALD WELDER,)
Petitioners.)

90-5672

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Philip B. Mears

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a prisoner can bring a civil rights action in federal court challenging prison discipline without exhausting state remedies so long as he does not seek restoration of good time credits.

2. Whether a prisoner challenging prison discipline in federal court who no longer has any available state remedy should have his action dismissed unless he can demonstrate cause for any state procedural default.

INTERESTED PARTIES

The parties to this proceeding before this Court are the Petitioners, all prisoners within the Iowa prison system, Rick Bressman, George Goff, Laurence Burgin, Ronald Brewer, Charles Reese, Chester Walton.

The Respondents in the Rick Bressman case are: Hal Farrier; Paul Grossheim; Calvin Auger; John Sissel; Paul Gretten; J. Manternach; Larry Brimeyer; and Mr. Butcher.

The Respondents in the George Goff case are: Crispus Nix; Harold Farrier; Deputy Warden Henry; CO Spangler; CO Rooney; CO Marshall; CO Severin; CO Drummond; CO Stevens; CO Fields; and CO Dilks.

The Respondents in the Laurence Burgin case are: Hal Farrier; Paul Grossheim; Crispus Nix; Ron Welder; Charles Harper; Marion Ware; John Sanders; Randall Martain; R.W. McVeigh; John Lewis; A.K. Anderson; Richard McAllon; Neal Breding; Captain Bridle; J.R. Goetz; Gerald Dolf; George Finn; Lt. Mitchell; Paul Schrock; John Dewey; Richard Larkin; George Clymax; Rick Barlow; Donnell Prough; Lt. Birdsell; Steve Young; Kevin Selton; Lt. Barnard; Lt. Corwell; James Rennes; Ray Olson; Pat McLaughlin; and Bob Washington.

The Respondents in the Ronald Brewer case are John Henry; Sarah Coats; and James Burton.

The Respondents in the Charles Reese case are: Hal Farrier; Warden C. Nix; Hedgepeth; John Henry; Ron Welder; and Charles

Harper.

The Respondents in the Chester Walton case are: Crispus Nix; Charles Harper; Lt. Ship; and Ronald Welder.

Other individuals or entities who may have an interest in the outcome of this litigation would include the State of Iowa and the Department of Corrections for the State of Iowa who are the employers of individual Respondents.

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REFERENCE UNOFFICIAL REPORTS OF LOWER COURT OPINIONS

The District Court decision in Bressman v. Farrier, No. C 87-0123 was entered by Judge David Hansen in the United States District Court for the Northern District of Iowa on March 22, 1988. It is unpublished, but is re-printed in the Appendix hereto at A-18, et seq.

The remaining cases are all from the Southern District of Iowa and were consolidated for purposes of consideration of Defendants' request for a stay of all further proceedings. The decision in all of those cases was entered by United States District Court Judge Donald O'Brien on May 6, 1988. The decision is unpublished. It is unpublished, but is reprinted in the Appendix at A-23.

The Eighth Circuit Court of Appeals decision is reported at 900 F.2d 1305 (8th Cir. 1990).

All Petitioners sought rehearing with Suggestion for Rehearing en Banc. On the 30th day of May, 1990, the Eighth Circuit denied the request for rehearing.

STATEMENT OF JURISDICTION

District Court jurisdiction in all of these cases was originally in the United States District Courts based on 28 U.S.C. 1331 and 1343. This was an action brought under the civil rights statute 42 U.S.C. 1983.

Jurisdiction of the Court of Appeals was based on 28 U.S.C. 1292(e). The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS PERTINENT TO THIS PETITION

No Constitutional provisions

42 U.S.C. 1983 (1982)

Iowa Code Section 663A

STATEMENT OF THE CASE

These civil rights cases involve Iowa prisoners that sought relief in the Iowa Federal Court from prison discipline they allege was in violation of the United States Constitution. In August of 1987, the Eighth Circuit handed down its decision in Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987). Almost immediately, the Defendants in these civil rights cases filed Motions to Stay further proceedings based on the Offet decision. At that point, the cases now before this court were in various stages of development. In some cases, the complaint had just been filed. In others, discovery had been undertaken. In at least one case, part of the trial had already occurred (Goff v. Nix).

In the one case before this court from the Northern District of Iowa, Bressman v. Farrier, Judge David Hansen granted the State's request for a stay. The Petitioner sought and obtained certification of the Offet question to the Eighth Circuit Court of Appeals. Petition to the Eighth Circuit followed.

In the Southern District of Iowa, Judge Donald O'Brien consolidated those cases before him presenting the Offet question, denying the Motion for a Stay on May 6, 1988. In most of the cases, he found there were exceptions to the Offet requirement that matters be stayed in federal court while prisoners pursued state court remedies. Essentially in those cases, he either found the state court remedy inadequate, futile or unable to address the complaint presented. In some instances,

he found no exceptions applied. In those cases he fashioned a remedy that in his judgment would avoid the concern expressed in Offet, a clash between the federal court and state court. Judge O'Brien gave certain Plaintiff's the option of waiving either his right to bring a state habeas action or his right to estop the state from relitigating any issues decided in the federal case. The Defendant prison officials requested certification of the question, which Judge O'Brien granted in an order dated June 15, 1988. The Defendants' Petition for Permission to take an Interlocutory Appeal to the Eighth Circuit was granted.

Particular Facts. The particular constitutional challenges raised by Petitioners in their original petitions are not important. In all cases before this Court, Petitioners, Iowa prisoners, challenged major discipline which resulted in a loss of some kind of good time credits.[1] Some challenge, such as that brought by Mr. Bressman, attacked the outcome of the disciplinary proceeding as a violation of his First Amendment rights.[2] In other cases, the complaint concerned inadequate procedural protection.

Several of the petitioners no longer have an available state

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[1] In some cases there were allegations about other things besides the major discipline. The Eighth Circuit correctly decided that those claims are not subject to the Offet ruling. Bressman, 900 F.2d 1305, 1307 (8th Cir. 1990). In a few cases, certain plaintiffs are serving life sentences. If and when their sentences are commuted, good time credits retroactively are granted.

[2] Mr. Bressman was disciplined for writing a letter to his brother containing derogatory comments about his counsellor.

remedy. Charles Reese and Chester Walter had filed stated post convictions at one time prior to coming to federal court, but the cases were dismissed for lack of prosecution. George Goff is barred from seeking state post conviction relief because of a state statute of limitations. See 663A.3, 1987 Code of Iowa.

Ron Brewer joins in this certiorari petition despite the fact that his claim was successful before the Eighth Circuit. While the case was pending before the Eighth Circuit, Mr. Brewer amended his complaint to add a challenge to the actual discipline eventually imposed. This part of his complaint is subject to the Eighth Circuit position regarding exhaustion of remedies.

Court of Appeals Decision. The Court of Appeals decision by Judge Bowman was not lengthy. He found that several of the prisoners were not in fact complaining about loss of good time credits and were therefore not subject to the stay request. 900 F.2d at 1307. Except for those few cases, Offet controlled and a stay should be granted.

More importantly, Judge Bowman went beyond the Offet ruling and addressed the question as to what would happen if a prisoner at one time in the past had a state remedy, but for one reason or another no longer had that remedy available. These individuals, said Judge Bowman, should have their federal claims for damages dismissed unless they could demonstrate "cause" for why they had not pursued those state remedies. 900 F.2d at 1308.

Judge Heaney filed a lengthy dissent. As an initial matter, he concluded that Offet was incorrectly decided, being

inconsistent with congressional intent and prior Supreme Court authority, as well as Eighth Circuit precedent. He further disagreed with the application of Offet to procedural due process claims, such as Ron Mahers', 900 F.2d at 1318-19, or to life prisoners, such as Charles Reese. Finally, he disagreed with the application of a procedural default rule.

ARGUMENT

I. WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW WHETHER THE FEDERAL COURTS HAVE JURISDICTION TO ENTERTAIN CLAIMS UNDER THE CIVIL RIGHTS ACT CHALLENGING PRISON DISCIPLINE SO LONG AS THE PRISONERS DO NOT SEEK RESTORATION OF GOOD TIME CREDITS AS PART OF THEIR RELIEF.

The Eighth Circuit Court of Appeals in 1987 decided that prisoners could not bring civil rights actions in federal court challenging prison discipline until they had exhausted state remedies, even if they sought only damages or prospective injunctive relief. Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987). Judge Arnold dissented. This principle was reaffirmed in United States v. Brown, 835 F.2d 178 (8th Cir. 1987). Judge McMillan dissented. Most recently, this principle was reaffirmed in a decision that involved a collection of prisoner cases from the State of Iowa in Bressman v. Farrier, et al., 900 F.2d 1305 (8th Cir. 1990). Judge Heaney dissented. The practical effect of these decisions is that as of this point in time, prisoners in

Iowa as well as elsewhere in the Eighth Circuit face all but insurmountable hurdles in challenging prison discipline in federal courts. For a number of reasons, this Court should grant certiorari to re-open to those prisoners the federal courthouse door.

A. Certiorari Should be Granted Because it Involves Important Federal Question.

The last forty years have seen the development in the federal courts of a variety of federal constitutional rights for all citizens. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed 873 (1954); Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). A necessary ingredient for this development has been the availability of a Federal Court forum for those who feel they have been mistreated in violation of Federal Constitutional principles. While deference has been accorded to state judicial and administrative tribunals in certain limited cases, Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), University of Tennessee v. Elliot, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986), the principle continues to be reaffirmed that an aggrieved party ought to be able to come to federal court to determine whether his or her United States Constitutional rights have been wronged. Patsy v. Board of Regents, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); Mitchum v. Foster, 407 U.S. 225, 92 S.Ct.

2151, 32 L.Ed.2d 705 (1972).

Individuals in prison, perhaps the most politically powerless in our society, have made good use of the federal court forum. Prisoners have sought relief from prison conditions as well as their criminal convictions. Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Procunier v. Martinez, 416 U.S. 396 (1974), Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 98 L.Ed.2d 64 (1987).

In 1974, the United States Supreme Court decided the case of Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). In that case, the Supreme Court determined that the Fourteenth Amendment to the United States Constitution protected prisoners requiring state officials to comply with Due Process before taking away good time credits. Since that time, litigation involving prison discipline has been extensive. Superintendent v. Hill, 472 U.S. 445 (1985); Ponte v. Real, 471 U.S. 491, 105 S.Ct. 2192, 85 L.Ed.2d 553 (1985). Federal court cases have developed various Due Process rights beyond Wolff both at the district court level and the Court of Appeals level. See cases cited by Judge Heaney, 900 F.2d at 1317.

For all intents and purposes, since the Offet decision, federal court litigation involving prison discipline has ended. Prisoners, even if they file in federal court, are sent back to state court. If they lose on the merits in state court, they are subject to preclusion under Allen v. McCurry, 449 U.S. 90, 101

S.Ct. 411, 66 L.Ed.2d 308 (1980). More often than not, once in state court they encounter procedural default rules of enormous proportions. See Aschan v. State, 446 N.W.2d 791 (Iowa 1989) (finding procedural default and therefore a lack of jurisdiction in the state courts where a person has not taken an internal administrative appeal); Bonds v. State, 447 N.W.2d 135 (Iowa 1989) (procedural default where a person has not raised a particular constitutional claim on administrative appeal). Since Offet was decided, the procedural hurdles in state court have mushroomed. The Iowa legislature has shortened the statute of limitations for disciplinary challenges from three years to ninety days. See 663A.3, 1989 Iowa Code Supplement. Recently, the Iowa legislature eliminated the right to appeal for prisoners challenging prison disciplinary decision in state court. See Amendment to Iowa Code 663A.9 effective July 1, 1990, Senate file 2139.

The Offet decision involves nothing short of the closing of the federal courthouse doors to a vastly unpopular group of people who have very little else in the way of a place to turn. This Court should grant certiorari to determine whether in fact that courthouse door should be closed.

B. Certiorari Should be Granted Because the Eighth Circuit Decision is Contrary to United States Supreme Court Precedent Regarding Prison Disciplinary Cases.

The starting point for concluding that the Offet decision was incorrectly decided is that it conflicts with specific

holdings in two United States Supreme Court cases, Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) and Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). These cases require exhaustion only when a prisoner seeks to shorten his sentence.

Preiser was the case that initially held that the exhaustion requirement of 28 U.S.C. 2254(b) might still apply to a civil rights action under 42 U.S.C. 1983, if in fact the relief sought by the prisoner was an early release from prison. Preiser held that the federal court should look to the substance of the relief sought to determine whether the action was a habeas corpus petition requiring exhaustion or a civil rights action for which no exhaustion was required. At the same time, the Court specifically noted:

> If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release--the traditional purpose of habeas corpus....A damage action by a state prisoner could be brought under the civil rights act in federal court without any requirement of prior exhaustion of state remedies.

411 U.S. at 494.

In the Wolff case, the Court considered an across-the-board challenge to procedures used to deprive prisoners of good-time credits. The Wolff court noted specifically that the prisoners' damage claims were properly before the district court, even though the good time request was properly dismissed. Furthermore, the Court noted that

> a declaratory judgment as a predicate to a damage award

> would not be barred by Preiser and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

Wolff, 418 U.S. at 554-555, 94 S.Ct. 2973-74.

Taken together, Preiser and Wolff decided that a complaint for restorations of lost good time is to be construed as a request for habeas corpus relief and must be dismissed until there is exhaustion of state remedies. Damage claims and injunctive claims, however, can proceed in federal court. In holding that such claims are also subject to an exhaustion requirement, the Offet decision is contrary to Supreme Court precedent. See Gwin v. Snow, 870 F.2d 616, 621 (11th Cir. 1989).

In the Offet decision Judge Bowman reasoned he could discount Preiser and Wolff because of a reference to the Preiser case in Tower v. Glover, 467 U.S. 914, 922, 104 S.Ct. 2820, 2825, 81 L.Ed.2d 758 (1984). See also Young v. Kenny, 887 F.2d 237, 239 (9th Cir. 1989). In Tower, Billy Glover brought a civil rights action for punitive damages against his public defenders and other participants in the criminal proceeding that led to his conviction. The district court granted a motion to dismiss as to the public defenders, finding absolute immunity from liability. Glover appealed the dismissal of the public defenders. It was that immunity question that was before the Supreme Court. The Court in remanding the matter to the lower courts for reconsideration of the case in light of its immunity

determination, noted in passing that it had had

> no occasion to decide if a federal district court should abstain from deciding a 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state court attacks on a conviction itself.

467 U.S. at 923.

The court then cited Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and Preiser. Four justices specifically disassociated themselves with those remarks, noting that particular issue had not been raised by the parties, that it had no bearing on disposition of the case, and that it had in no way been presented to the court. 104 S.Ct. at 2827.

There are several problems with interpreting the comment in Glover to essentially overrule Preiser and Wolff. First of all, the actual language of this reference in Glover does use the term "abstain," which is consistent with the primary reference to Younger. While there is passing reference to the Preiser decision, the first cited case after the sentence is Younger. Secondly, footnote 6 in the Glover case, which appears at the end of the sentence quoted above, mentions four Court of Appeals decisions, all of which involved criminal convictions that were being attacked in the 1983 damage action.[3]

Greater deference is owed to a state court determination than to a prison disciplinary action. See Serio v. Louisiana

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[3] Meadows v. Evans, 529 F.2d 385, 386 (5th Cir. 1976) aff'd en banc 550 F.2d 345 (1971); Martin v. Merola, 532 F.2d 191, 194-5 (2nd Cir. 1976); Guerro v. Molhearn, 498 F.2d 1249, 1251-1255 (1st Cir. 1974); Alexander v. Emerson, 489 F.2d 285 (5th Cir. 1973).

Board of Pardons, 821 F.2d 1112, 1116 (5th Cir. 1987). Finally as a matter of fact, so much deference may be owed to a state district court decision that there may be a preclusive effect to the criminal conviction in the 1983 case. Indeed, in Glover, the Supreme Court in remanding the case to district court, directed the court to consider whether the Allen v. McCurry decision would collaterally estop Mr. Glover in his civil rights complaint. 467 U.S. at 924. Certainly no one is suggesting that a similar collateral estoppel effect ought to be given to the decisions of a prison disciplinary committee.

The Glover decision must be considered in light of the fact that it concerned a 1983 claim for damages involving a criminal conviction from a state court. When the case is so viewed, it is clear that the case does not suggest that the otherwise clear-cut language of Preiser and Wolff regarding a damage action for a prison disciplinary proceeding should be disturbed.

The holding in the Offet decision as affirmed in Bressman is contrary to long-standing United States Supreme Court precedent and misguided in its reading of Tower v. Glover.

C. The Eighth Circuit Rule is Contrary to Supreme Court Authority in General with Regard to Civil Rights Claims.

The majority in Offet characterized as somewhat "arbitrary" the distinction drawn by the Supreme Court in Wolff and Preiser between good time claims and damage or injunctive claims. Presumably, applications of exhaustion requirements to claims other than claims for lost good time is more easily

justified if the distinction between these categories of claims is arbitrary or otherwise without foundation in reason. The distinction is not arbitrary in light of the federal law of habeas corpus and the law of res judicata.

The federal habeas corpus statute, 28 U.S.C. 2241 et seq., contain a statutory exhaustion requirement. As a general matter, prisoners challenging their state court convictions are required to present their claims first to state courts before they can be heard in federal court. At the same time, with a few exceptions, after the prisoner has exhausted his state remedies, he may bring an action in federal court and re-litigate the merits of the constitutional claim. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L. Ed.2d 837 (1963).

> [A]fter the state courts had decided the federal question on the merits against the habeas petitioner, he could return to the federal court on habeas and there relitigate the question, else a rule of timing would become a rule of circumscribing the power of the federal courts on habeas.

372 U.S. at 421.

Put another way, in federal habeas corpus litigation, the impact of the exhaustion requirement is softened by the federal court's promise to a prisoner that once the exhaustion has taken place he can return to federal court and be heard on the merits of his complaint. Exhaustion is required. But there is no preclusion.

In the context of civil rights cases, including claims for damages and injunctive relief, the United States Supreme Court has held such claims subject to preclusion. If a matter has been presented to a state court, the federal court is required to give

preclusive effect to the state court determination. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); University of Tennessee v. Elliott, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986). As long as a plaintiff has been afforded a full and fair opportunity to litigate a matter in a state court proceeding, or sometimes even in an administrative proceeding (Elliott), he cannot re-litigate the matter in federal court under the civil rights statute. At the same time, and perhaps because of the preclusive effect of state court determinations, the Supreme Court has consistently adhered to the view that there is generally no exhaustion requirement in civil rights cases. Patsy v. Board of Regents, 457 U.S. 496, 500-16, 102 S.Ct. 2557, 2259-68, 73 L.Ed.2d 172 (1982). Put another way, outside of the habeas corpus context, there is preclusion, but exhaustion is not required.

When the habeas cases raising exhaustion and preclusion issues are read with the civil rights cases raising those same issues, a pattern emerges that explains all cases involving claims in federal court concerning violation of federal rights. Where exhaustion is required, there will be no preclusion. Where there is preclusion, there will be no exhaustion required. The overriding consideration is the promise to litigants that they will in fact have a federal forum for their federal

constitutional claims. The promise of a federal forum for federal constitutional claims exists under 28 U.S.C. 2241 and under 42 U.S.C. 1983.

It is this coherent pattern that makes the distinction drawn in Wolff and Preiser more than an arbitrary line. When the prisoners in Wolff brought claims for damages, injunctive relief, and restoration of good time credits, the part of their complaint dealing with good time credits could not go forward in the federal forum. It was, in essence, a habeas petition, and exhaustion of state remedies was required. Thus, that claim had to be taken to state court. At the same time, if the prisoner pursued the state remedy and lost, the prisoner could return to federal court in a habeas proceeding. The determination in the state proceeding would not be given preclusive effect.

Any prisoners pursuing damage or injunctive claims while subject to the Offet decision are not as fortunate. They may be forced, regardless of the nature of the claims, to pursue state court remedies under Offet. If they lose and return to federal court, their damage or injunctive claims will be precluded under McCurry.

After Offet, there is nonetheless a possible way for a prisoner to obtain a federal forum for federal constitutional claims. A prisoner, who has lost a state court post conviction proceeding and would thereby be precluded in a Section 1983 action, could stay the 1983 action even longer while he returns to federal court under the federal habeas statute. If the

prisoner wins the habeas proceeding, that favorable outcome would effectively overturn the loss in the state post conviction proceeding, which otherwise would have been preclusive. At that point, the prisoner could pursue his long-stayed Section 1983 claim. This procedure would, to some extent, counter the potential impact of the preclusive effect. At the same time, it would require that the 1983 damage action stayed by Offet be stayed further while the prisoner first pursues a state post conviction proceeding, or its equivalent, appeals any adverse decision to the state appellate courts,[4] and then brings an action under 28 U.S.C. 2254. Finally, after all of that, the prisoner could bring a damage claim. Is this procedure a desired result? The plaintiffs think not.

It should be noted that the federal habeas corpus statute imposes a custody requirement in addition to the exhaustion requirement. Cases take long enough under the present arrangement. If the only way a prisoner may obtain a federal forum on a 1983 damage claim is to pursue first a state court remedy and then a state court appeal, the prisoner in many cases will no longer be in "custody" by the time the state post conviction proceeding is completed. If the prisoner is not in custody, he will not have the federal habeas remedy available to permit him to obtain the federal forum to seek to set aside the

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[4] Exhaustion requires appealing adverse state district court determinations. See Brown v. Swenson, 487 F.2d 1236 (8th Cir. 1973), cert. den. 416 U.S. 944, 94 S.Ct. 1952, 40 L.Ed.2d 296 1974.

adverse state post conviction remedy. Preclusion would rule. Such prisoner-complainants would in fact be deprived of a federal forum for their damage complaint. Bressman, 900 F.2d at 1313 (Heaney dissenting).

D. Certiorari Should be Granted Because there is a Conflict Within the Circuits with Regard to the Requirement that Prisoners Exhaust Remedies.

One traditional reason for granting certiorari is to resolve a conflict among the Circuits of the Circuit Courts of Appeal. With respect to the jurisdictional question presented in this case, the conclusion that the Circuit Court of Appeals are in conflict quite frankly puts it too mildly. Judge Heaney in his dissent in this case canvassed the various Circuits and concluded that no circuit court in the country followed the Offet ruling. 900 F.2d at 1316. On the other hand, Judge Kozinski in his decision in Young v. Kenny, 887 F.2d 237 (9th Cir. 1989) made almost the same examination of the Circuits, concluding that every Circuit followed Offet. 887 F.2d at 239. While it is not important to decide which of these judges was correct in his specific analysis, it is sufficient to conclude that there is not unanimity among the Circuits.

In certain circuits, prisoners are not required to exhaust state remedies. Viens v. Daniels, 871 F.2d 1328 (7th Cir. 1989); Gwin v. Snow, 870 F.2d 616 (11th Cir. 1989); Monk v. Secretary of Navy, 793 F.2d 364 (D.C. Cir. 1986); Mack v. Varelas, 835 F.2d 995 (2nd Cir. 1987). In the Viens case Judge Codahy notes with

approval the arguments made by Judge Arnold in his dissent in Offet. 871 F.2d at 1333. All of these cases recognize that Preiser and Wolff specifically provide that actions for damages should be allowed to proceed.

On the other hand, clearly prisoners in the Eighth and Ninth Circuits are required to exhaust state remedies whenever the claim presented in any way involves discipline that might have concerned good time credits. Bressman, supra; Young, supra.

Several other Circuits have adopted somewhat different rules. In the Fifth Circuit, if a prisoner is complaining about a problem that existed at a particular hearing rather than one that occurs on an ongoing basis or occurred in many cases, he or she will have to exhaust remedies. Serio v. Members of the Louisiana Board of Pardons, 821 F.2d 1112 (5th Cir. 1987). Other circuits have apparently adopted a dichotomy based on the particular constitutional claim advanced in the civil rights action. Georgevich v. Strauss, 772 F.2d 1078, 1086-87 (3rd Cir. 1985); cert. den. 475 U.S. 1028, 106 S.Ct. 1229, 89 L.Ed.2d 339 (1986); Williams v. Ward, 556 F.2d 1143, 1150-51 (2nd Cir.) cert. den. 434 U.S. 944, 98 S.Ct. 469, 54 L.Ed.2d 323 (1977). If the constitutional claim attacks the disciplinary procedure used, exhaustion is not required. This would appear to follow because the establishment of the violation would simply result in a new hearing rather than total and final expungement of a record through the restoration of good time credits automatically following.

What is clear from any examination of the Circuit Court of Appeals decisions is that some federal courts are available to prisoners for challenging discipline and some aren't. Certiorari should be granted by this Court to review the question presented in the appeals below.

II. WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW WHETHER A PRISONER CHALLENGING PRISON DISCIPLINE SHOULD HAVE HIS CLAIM IN FEDERAL COURT DISMISSED IF HE HAD A STATE PROCEDURAL PREVENTING HIM FROM LITIGATING HIS CLAIM IN STATE COURT ON THE MERITS.

In some of the consolidated cases before the Court of Appeals in Bressman, several of the prisoner-Plaintiffs could not at this time bring an action in state court where their constitutional complaints would be decided on the merits. In several cases, Charles Reese and Chester Walton, the prisoners did not personally appear at state post conviction hearings, where their case was dismissed for lack of prosecution. In another case, Goff v. Nix, the state statute of limitations has passed, so Mr. Goff will not be able to bring any state post conviction. Ron Brewer, who eventually challenged prison discipline he received, may not be able to get a state court determination on the merits because he did not take a second internal administrative appeal. In all of these cases, the Eighth Circuit decision in the Bressman case will direct that the district courts dismiss the complaints unless the prisoners can show "cause" for why they suffered that state procedural default.

This decision in the Bressman case, recognizing state procedural default as grounds for dismissing claims brought under the civil rights statute, imposes a complete exhaustion requirement on prisoners contrary to established United States Supreme Court precedent. In Patsy v. Board of Regents, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), the United States Supreme Court decided that federal civil rights plaintiffs did not have to exhaust state remedies prior to coming into federal court. That case made clear that there is an important federal principle that recognizes that plaintiffs should be able to have early access to a federal court forum if in fact their constitutional rights are in question. The Bressman decision is obviously in direct conflict with Patsy.

There is a narrow exception to the Patsy principle where interests in state-federal comity override the principle of providing federal court forum. If there is an ongoing state court proceeding at the time the action is brought into federal court, federal court deference may be appropriate to that state court proceeding. Younger, supra. It is important to understand that implicit in the requirement of deference to the state court under this narrow exception is the principle that the state court will in fact be able to address the constitutional claim.

In Preiser v. Rodriguez and Wolff v. McDonnell, the United States Supreme Court recognized that certain civil rights petitions involving good time credits should be recognized as federal habeas corpus proceedings because that was the relief

being sought. In those cases, exhaustion was required, contrary to Patsy, because of the specific congressional legislation providing for an exhaustion requirement in habeas cases. If a case is treated as a habeas case, and there is no longer a state remedy, the habeas case should be subject to procedural default analysis. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

In Offet v. Solem, the Eighth Circuit extended the Preiser holding with respect to good time credits to claims for damages following prison discipline. The theory was that while claims for damages weren't directly barred by the congressional statute, if the prisoner succeeded in federal court on the damage claim, he could use issue preclusion in state court to establish his habeas entitlement, thereby interfering with federal-state comity. Offet 823 F.2d at 1258. This chain of reasoning simply does not apply if there has been state procedural default with respect to habeas claims. Even if the prisoner wins in federal court in his damage action, he will still not be able to do anything with that in state court in seeking restoration of his good time credits. If there has been state procedural default, there simply will not be any interference with any possible state court proceeding. There is no reason under these circumstances to fit a person such as George Goff into any exception to the basic Patsy principle that exhaustion is not required. There is absolutely no concern that any federal adjudication will

interfere with any state function.

CONCLUSION

There is generally no requirement that people exhaust state remedies before they come to federal court challenging state action under 42 U.S.C. 1983. The Eighth Circuit has established such a requirement for all prisoners challenging prison discipline. While this Court recognized a small exception for certain cases fifteen years ago, the Eighth Circuit extends that exception to become the rule. This Court should review this Eighth Circuit rule. The federal courthouse door should be reopened to prisoners challenging prison discipline.

RESPECTFULLY SUBMITTED,

Dated Aug 28, 1990

Philip B. Mears

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CERTIFICATE OF SERVICE
PURSUANT TO SUPREME COURT RULES 28.3 AND 28.5(b)

I, Philip B. Mears, hereby certify that a single copy of the foregoing Petition for Writ of Certiorari has been served upon all parties required to be served:

Hal Farrier and Paul Grossheim
Department of Corrections
Capitol Annex
523 East 12th Street
Des Moines, Iowa 50319

Calvin Auger (deceased); John Sissel; Paul Gretten; J. Manternach; Larry Brimeyer; Mr. Butcher
c/o Iowa Men's Reformatory
Box B
Anamosa, Iowa 52205

Crispus Nix; Deputy Warden Henry; CO Spangler; CO Rooney; CO Marshall; CO Severin; CO Drummond; CO Stevens; CO Fields; CO Dilks; Ron Welder; Charles Harper; Marion Ware; John Sanders; Randall Martain; R.W. McVeigh; John Lewis; A.K. Anderson; Richard McAllon; Neal Breding; Captain Bridle; J.R. Goetz; Gerald Dolf; George Finn; Lt. Mitchell; Paul Schrock; John Dewey; Richard Larkin; George Clymax; Rick Barlow; Donnell Prough; Lt. Birdsell; Steve Young; Kevin Selton; Lt. Barnard; Lt. Corwell; James Rennes; Ray Olson; Pat McLaughlin; Bob Washington; John Henry; Sarah Coats; James Burton; Hedgepeth; John Henry; and Lt. Ship
c/o Iowa State Penitentiary
Box 316
Fort Madison, Iowa 52627

by serving Layne Lindebak, Assistant Attorney General of the State of Iowa, counsel for all three parties, in conformity with Supreme Court Rules 28.3 and 28.5(b). Service was made by enclosing the same in an envelope in a first-class United States Post Office mail depository, on the 28 day of August, 1990.

Philip B. Mears

APPENDIX

Decision of the Eighth Circuit Court of Appeals.....A-1

District Court Opinion in Bressman v. Farrier.....A-18

District Court Opinion in Goff v. Nix, et al.....A-23

Order Denying Petition for Rehearing from the Eighth Circuit Court of Appeals.....A-52

g the district judge's discretion in g his responsibility to supervise the e of the accused.

ick Dean BRESSMAN, Appellant,

v.

Hal FARRIER, et al., Appellees.

George GOFF, Appellee,

v.

spus NIX; Harold Farrier; Deputy arden Henry; Correctional Officer pangler; Correctional Officer Rooney; orrectional Officer Marshall; Correc-ional Officer Severin; Correctional Of-icer Drummond; Correctional Officer tevens; Correctional Officer Fields; Correctional Officer Dilks, Appellants.

George GOFF, Appellee,

v.

Steve DAILEY, Superintendent of Clarinda; Correctional Officer Huskins, Appellant.

Laurence BURGIN, Appellee,

v.

FARRIER; Paul Grossheim; Crispus ; Ron Welder; Charles Harper; Marion Ware; John Sanders; Randall artain; R.W. McVeigh; John Lewis; A.K. Anderson; Richard McAllon; Neal Breding; Captain Bridle; J.R. Goetz; Gerald Dolf; George Finn; Lt. Mitch-ell; Paul Schrock; John Dewey; Rich-ard Larkin; George Clymax; Rick Barlow; Donell Prough; Lt. Birdsell; Steve Young; Kevin Selton; Lt. Barnard; Lt. Crowell; James Rennea; Ray Olson; Pat McLaughlin; Bob Washington, Appellants.

Ronald W. BREWER and James Whited, Jr., Appellees,

v.

John HENRY; Sarah Coats; James Burton (Captain), Appellants.

Ronald A. MAHERS, Appellee,

v.

Crispus C. NIX; Charles Harper; Ken Wittry; Ronald G. Welder; Paul Grossheim, Appellants.

Charles O. REESE, Appellees,

v.

Hal FARRIER; C.C. Nix, Warden; Hedgepeth; John Henry; Ron G. Welder; Charles Harper, Appellants.

Chester WALTON, Jr., Appellee,

v.

Crispus C. NIX; Charles Harper; Lieutenant Ship; Ronald G. Welder, Appellants.

Nos. 89-1186, 89-1187.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 13, 1988.

Decided April 19, 1990.

Inmates filed separate civil rights actions, challenging prison disciplinary proceedings and, in some cases, seeking restoration of good-time credits. The United States District Court for the Northern District of Iowa, David R. Hansen, J., and the United States District Court for the Southern District of Iowa, Donald E. O'Brien, Chief Judge, stayed some actions pending exhaustion of state remedies, but refused to stay other actions. Petitions for interlocutory appeal were granted. The Court of Appeals, Bowman, Circuit Judge, held that those actions in which inmates chal-

lenged the forfeiture of good-time credits and sought restoration of credits should have been stayed pending exhaustion of state remedies, but those actions that did not seek restoration of good-time credits were not subject to stay.

Remanded.

Heaney, Senior Circuit Judge, filed a concurring and dissenting opinion.

1. Civil Rights ⇐209
Habeas Corpus ⇐666

Inmates' challenges to confinement in prediscipliinary investigative lock-up did not involve loss of good-time credits and, thus, inmates' civil rights actions were not to be treated as habeas petitions and inmates were not required to exhaust state remedies. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐209
Habeas Corpus ⇐666

Inmate's civil rights action claiming that prison disciplined him in retaliation for exercising First Amendment rights would not be treated as habeas corpus petition and, thus, inmate was not required to exhaust state remedies, even though discipline included forfeiture of good-time credits, where imposition of sanctions had been suspended. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 1.

3. Civil Rights ⇐209

Inmate's civil rights action seeking damages and restoration of good-time credits that he lost as result of disciplinary action would affect length of confinement and, thus, action was appropriately stayed pending exhaustion of state court remedies. 42 U.S.C.A. § 1983.

4. Civil Rights ⇐209

Inmate's civil rights action in which he sought declaration that discipline resulting in forfeiture of good-time credits and segregation violated his constitutional rights was barred by failure to exhaust state remedies within three-year Iowa statute of limitations, unless inmate could establish cause for failure to seek state relief in timely manner. 42 U.S.C.A. § 1983; I.C.A. § 663A.2, subd. 6.

5. Civil Rights ⇐209

Requirement that inmate exhaust state remedies before coming into federal court with civil rights complaint that directly attacks length of confinement or seeks restoration of good-time credits should not be avoided by waiver option under which inmate would have option to waive right to proceed in state court under postconviction proceedings or habeas corpus, or waive right to estop state from relitigating civil rights issues in any subsequent state court action. 42 U.S.C.A. § 1983; I.C.A. § 663A.2, subd. 6.

Philip B. Mears, Iowa City, Iowa, for appellants.

Layne M. Lindebak, Des Moines, Iowa, for appellees.

Before HEANEY,* BOWMAN, and MAGILL, Circuit Judges.

BOWMAN, Circuit Judge.

These consolidated appeals draw us once more into that ambiguous borderland between habeas corpus actions and suits brought by state prisoners under 42 U.S.C. § 1983, which we first explored in *Offet v. Solem*, 823 F.2d 1256, 1257 (8th Cir.1987). In *Offet*, we held that under *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the appropriate vehicle for a state prisoner who is directly attacking the length of his confinement and seeking restoration of his good-time credits is a petition for writ of habeas corpus, which requires exhaustion of state remedies before coming into federal court. *Offet*, 823 F.2d at 1257. In addition to seeking restoration of his good-time credits, however, Offet requested declaratory relief and damages. Nevertheless, we recognized that a federal ruling in favor of Offet on the constitutional issue underlying his section 1983 claim for declaratory relief and damages would effectively establish an irrefutable claim for early or immediate release

* The Honorable Gerald W. Heaney assumed senior status effective January 1, 1989.

habeas, and thereby preclude state ...ration of the same issue in a subse... state proceeding. *Id.* at 1258. Accordingly, we concluded the same comity ...required the district court to stay ...section 1983 claim for restoration of ...od-time credits pending exhaustion of ...te remedies, also required the court ...his claim for declaratory relief and ... *Id.* at 1259.

...ach of the cases now before us, one ...e inmates in the Iowa prison system ...relief in federal court under 42 U.S.C. ...83 from prison discipline that allegedly ...ted their constitutional rights. After ...decision in *Offet*, the state moved to ...ss or stay further proceedings until ...mates exhausted their state remedies ...Iowa Code § 663A.2(6) (1987), which ...forth the procedures by which prisoners can challenge the forfeiture of good-...e credits in state court. A stay was ...nted in the case of *Bressman v. Farrier*, ...No. 89–1186.[1] The remaining cases ...re consolidated, No. 89–1187, and the ...otions for stay were denied on May 6, ...988.[2] We granted the petitions for interlocutory appeal filed by plaintiff Bressman ... by the state.

B. Suits Not Subject to *Offet*

Brewer v. Henry

Whited v. Nix

[1] Ronald Brewer's section 1983 complaint challenges the constitutionality of his lengthy confinement in prediscipliinary investigative lock-up. Because summary placement in investigative lock-up does not entail a loss of good-time credits, a finding that the prison had acted unconstitutionally would not affect the length of Brewer's confinement, and the rationale of *Offet* is inapplicable. Accordingly, we affirm the denial of the motion to stay, and remand for further proceedings.

James Whited was placed in investigative lock-up at the same time as Brewer and filed a similar complaint. Noting the similarity between the complaints, the district court joined the two cases under the same district court number. Although the district court's order denying the motion to stay refers only to Brewer it appears the state and Whited believe the order also applies to him. We remand for clarification of the district court's order in light of our disposition of *Brewer v. Henry*.

Goff v. Dailey

[2] George Goff's complaint alleges the prison disciplined him in retaliation for exercising his First Amendment rights. Although Goff's discipline included forfeiture of sixteen days of good-time credits, the prison suspended imposition of the sanctions. Because Goff thus did not forfeit any good-time credits, a federal determination on the merits of his claim would not affect the length of his confinement, and *Offet* does not apply. Accordingly, we affirm the denial of the motion to stay, and remand for further proceedings.

B. Suits Subject to *Offet*

Bressman v. Farrier

[3] Rick Bressman's section 1983 action seeks damages and the restoration of good-time credits that he lost as the result of a disciplinary action. Bressman alleges the prison violated his constitutional rights by disciplining him for the contents of a letter he wrote to his brother. Because a federal determination on the merits of this claim would affect the length of Bressman's confinement, the district court was correct in staying Bressman's claim. Furthermore, we do not believe Bressman's subsequent attempt to omit his request for restoration of good-time credits warrants a different result. As we noted in *Offet*, "the question of whether exhaustion should be required should not be determined solely by reference to the relief the plaintiff requests." *Offet*, 823 F.2d at 1258.

Bressman also alleges his rights were violated when the prison, in contravention

1. The Honorable David R. Hansen, United States District Judge for the Northern District of Iowa.

2. The Honorable Donald E. O'Brien, United States District Judge for the Southern District of Iowa.

of prison regulations, failed to notify his brother that it had intercepted and confiscated the letter sent to him by Bressman. Because this claim does not involve the deprivation of good-time credits, the district court correctly denied the stay as to this claim, and we affirm.

Goff v. Nix

[4] George Goff's section 1983 claim seeks a declaration that disciplinary action, resulting in the forfeiture of good-time credits and disciplinary segregation, violated his constitutional rights. Goff did not challenge his discipline in state court as provided by Iowa Code § 663A.2(6), and as the district court noted, the three-year statute of limitations for bringing any state action relating to the discipline expired prior to our decision in *Offet*. The district court ended its analysis at this point and denied the motion to stay on the ground that any subsequent state action would be futile given the statute of limitations. Nevertheless, we believe the important principles of federalism underlying the exhaustion requirement, *see Fay v. Noia*, 372 U.S. 391, 433, 83 S.Ct. 822, 846, 9 L.Ed.2d 837 (1963), require the district court to dismiss Goff's federal claim unless he can establish cause for his failure to seek state relief in a timely manner. Accordingly, we remand for further proceedings.

Walton v. Nix

Chester Walton's complaint, filed in 1986, challenges disciplinary action taken in 1986 that resulted in a forfeiture of good-time credits. In his answer to the state's petition for interlocutory appeal, Walton indicates that he filed a state postconviction action in 1984, which was dismissed in 1985 for failure to prosecute. He apparently did not appeal the dismissal. Walton further states he was unable to prosecute his state action because he did not have contact with his attorney and therefore was unaware of any hearings or that his action had been dismissed. Because the district court did not have this information before it, we remand to the district court with directions that Walton's complaint be dismissed unless he establishes cause for his failure to prosecute his state action or appeal [illegible] missal.

Reese v. Farrier

Charles Reese's complaint, filed [illegible] 1987, challenges the results of disc[illegible] action taken between September [illegible] February 1985, and also alleges [illegible] of his Eighth Amendment rights by [illegible] of brutality at the hands of prison [illegible] Reese seeks damages, restoration of [illegible] time credits, and expungement of [illegible] nary records. He filed a state postco[illegible] tion action in May 1987 challenging [illegible] of the disciplinary proceedings. The ac[illegible] was dismissed in 1988 when Reese did [illegible] appear at a hearing. He did not appeal [illegible] dismissal. Accordingly, as in *Walton* [illegible] *Nix*, we remand for a determination [illegible] whether Reese can establish cause for [illegible] failure to appear at the hearing or appeal the dismissal. If not, his claims arising from the disciplinary proceedings must be dismissed. Because Reese's Eighth Amendment claim does not involve good-time credits, it is not governed by *Offet*, and may proceed in district court.

Mahers v. Nix

Ronald Mahers filed his section 1983 claim seeking damages and restoration of the good-time credits he lost as the result of a prison disciplinary hearing. Mahers initiated an administrative appeal from his disciplinary hearing, and received a rehearing at which the results of the first disciplinary hearing were confirmed. He did not file an action in state court, but filed this suit raising a number of due process challenges to both hearings, and challenging the constitutionality of the length of his disciplinary detention. The district court considered this a "mixed" complaint, holding Mahers would not be able to challenge his first hearing or the length of his detention in a state postconviction action because his loss of good-time credits stemmed from his second hearing which he could challenge in a chapter 663A proceeding. Accordingly, the court noted Mahers could reframe his complaint and drop those challenges subject to the *Offet* exhaustion requirement,

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[illegible] challenges which would result in [illegible]oration of good-time credits. We [illegible]

As an alternative, the district court [illegible]Mahers an option of waiving his right [illegible]ceed in state court under chapter [illegible]r habeas corpus, or waiving his right [illegible]op the state from relitigating the [illegible] decided in his section 1983 claim in [illegible]subsequent state action. Arguably, [illegible]a waiver option adequately addresses [illegible]interests of federalism that underlie [illegible]exhaustion requirement in habeas [illegible]. Nevertheless, we believe adoption [illegible]uch a solution is problematic at best, [illegible]at worst could produce the untenable [illegible]lt of a federal court first ruling that an [illegible]ate is entitled to a monetary award for [illegible]constitutional deprivation of his good-[illegible]e credits, and a state court later deny-[illegible] restoration of those same good-time [illegible]edits. Accordingly, we hold that *Offet* [illegible]y not be avoided by resort to the waiver [illegible]ption that the district court here em-[illegible]loyed.

In his answer to the state's petition for interlocutory appeal, however, Mahers indicates that he filed an action for postconviction relief in state court to avoid any statute of limitations problems. The record contains no disposition of that case. Because the district court did not have this information before it, we remand for a determination of whether Mahers has exhausted his state remedies. If he has not, his complaint must be stayed unless he amends it to delete the claims that are subject to the *Offet* exhaustion requirement.

Burgin v. Farrier

Laurence Burgin's section 1983 claim challenges forty-four disciplinary proceedings brought against him from February 29, 1984, through April 14, 1987. Although Burgin lost good-time credits, he requests only damages, release from lock-up, and prospective injunctive relief. After the state filed its motion to stay the proceedings, Burgin filed actions in state court challenging some of the disciplinary proceedings. The state court dismissed eight of Burgin's complaints as being barred by the statute of limitations.

We remand for consideration of whether he can demonstrate cause for his failure to present these claims to the state court in a timely manner. On remand, the district court should also determine whether any of Burgin's remaining claims are barred by the state statute of limitations applicable to section 1983 actions, and if not, whether Burgin has exhausted his state remedies with respect to these claims or can demonstrate cause for his failure to do so. If he has not, then his section 1983 action must be stayed with respect to these claims as required by *Offet*.

HEANEY, Senior Circuit Judge, concurring and dissenting.

I agree that *Bressman* is consistent with this court's opinion in *Offet v. Solem*, 823 F.2d 1256 (8th Cir.1987). *Offet*, however, was wrongly decided. *Offet* is contrary to congressional intent, it is inconsistent with decisions of the United States Supreme Court, and it disregards binding precedents of this court. We are required to adhere to our former decisions until and unless this court adopts *Offet* en banc. I thus am bound by our pre-*Offet* decisions and I must dissent in *Bressman*. I also dissent in *Mahers*, *Goff v. Nix*, *Walton*, *Reese*, and *Burgin* for the same reason, because each of these cases extends *Offet* beyond its present rationale, and because each conflicts with past decisions of this circuit. In my view, the court en banc must rehear the above cases to resolve the conflicts in our decisions.

The majority is correct that exhaustion is not required in *Brewer*, *Whited*, and *Goff v. Dailey*, and that *Offet* should not apply to them. I thus concur in these three cases.

I. BACKGROUND

Offet justifies new restrictions on the access of state prison inmates to federal court in 1983 cases as an incident of federalism and on the basis of the Supreme Court's decision in *Preiser v. Rodriguez*,

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411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).[3] Ultimately, the validity of *Offet* depends on whether the statutes which create inmate access to federal court require the restrictions. I thus pause to review the applicable statutes and the holdings in *Preiser* and *Offet*.

Congress has created a statutory system that allows state prison inmates to use section 1983 actions and habeas corpus writs to raise federal constitutional challenges to the conditions or duration of their confinement. 28 U.S.C.A. § 2254 (1977) (habeas corpus); 42 U.S.C.A. § 1983 (1981). Section 1983 allows citizens to sue for violations of their federal civil rights. A 1983 plaintiff may sue for damages and is not required to exhaust state judicial or administrative remedies before proceeding in federal court. *See Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 500–07, 102 S.Ct. 2557, 2559–63, 73 L.Ed.2d 172 (1982). Jurisdiction is nevertheless concurrent in federal and state courts. If a citizen elects to proceed in state court, the state court judgment may have a preclusive effect on the same claims brought in a subsequent federal proceeding. *Allen v. McCurry*, 449 U.S. 90, 101, 101 S.Ct. 411, 418, 66 L.Ed.2d 308 (1980). Habeas corpus actions are available to citizens confined in state prisons and historically have served to insure that state criminal proceedings and state criminal law conform to federal constitutional standards. To give states the first opportunity to correct their own mistakes, a prisoner bringing a habeas corpus action must exhaust state judicial remedies before proceeding in federal court. 28 U.S.C.A. § 2254(b). To preserve meaningful federal review, however, the state court judgment is not res judicata on conclusions of law in a subsequent habeas corpus suit brought in federal court on the same grounds. 28 U.S.C.A. § 2254(d); *Preiser*, 411 U.S. at 497, 93 S.Ct. at 1840. Habeas corpus is now also available for challenges to prison disciplinary proceedings that extend the duration of an inmate's confinement. *See Peyton v. Rowe*, 391 U.S. 54, 63–64, 88 S.Ct. 1549, 1554–55, 20 L.Ed.2d 426 (1968) (allowing habeas challenges even where there was no immediate release from confinement, overruling *McNally v. Hill*, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934)).

In *Preiser v. Rodriguez*, the Supreme Court concluded that a section 1983 complaint challenging prison disciplinary proceedings and seeking only injunctive relief was sufficiently "close to the core of habeas corpus" that habeas corpus relief should be an exclusive remedy, requiring the exhaustion of state remedies. 411 U.S. at 489–91, 93 S.Ct. at 1836–37. The prisoner's claim can be refiled in its entirety as a federal habeas claim, so the state's legal conclusions about federal rights are still subject to de novo review in federal court. *Preiser* thus protects Congress's express desire for state judicial exhaustion of habeas corpus claims. *Id.* at 489–90, 93 S.Ct. at 1836.

The Supreme Court did not intend that an exhaustion requirement be applied to section 1983 suits seeking damages,[4] nor has the Court applied it to damage claims even where the issue presented was the legitimacy of disciplinary decisions which resulted in a loss of good-time credits. *See Wolff v. McDonnell*, 418 U.S. 539, 553–55,

3. The majority in *Offet* indicated that it was concerned to protect "the concerns of federalism," "federal—state comity," "respect for state autonomy," "the policy announced in *Preiser*," and "*Preiser*'s policy requiring exhaustion." 823 F.2d at 1258–60.

4. The Court's language creating this relief-based distinction between section 1983 and habeas claims was quite clear.

> [R]espondents here sought no damages, but only equitable relief—restoration of their good-time credits—and our holding today is limited to that situation. If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. **In the absence of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damage action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.**

Preiser, 411 U.S. at 494, 93 S.Ct. at 1838 (emphasis added).

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Ct. 2963, 2973–74, 41 L.Ed.2d 935 (1974). The Court distinguished between damage claims and requests for an injunction ordering release or the restoration of good time, and the Court expressly authorized simultaneous federal and state litigation involving the same disciplinary proceedings where the federal section 1983 complaint sought damages unavailable in habeas proceedings.

Preiser expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings.... Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct.

Id. at 554–55, 94 S.Ct. at 2974.

The *Offet* panel, over a strong dissent by Judge Richard A. Arnold, discarded the Supreme Court's relief-based distinction, fearing that in cases where the federal court acted first on the prisoner's claim, the application of res judicata principles would restrict the ability of state tribunals to independently correct any errors regarding the disciplinary proceeding. 823 F.2d at 1258. *Offet* requires that a federal action challenging a disciplinary proceeding that resulted in a loss of good time be stayed pending state exhaustion if a federal decision would have a preclusive effect in a subsequent state post-conviction proceeding, even where the prisoner seeks damages unavailable in state post-conviction proceedings. *Id.* at 1259.

The Court also held that *Preiser* did not foreclose declaratory relief at the outset of a 1983 action regarding disciplinary procedures, nor did *Preiser* apply to claims for prospective relief. *Wolff*, 418 U.S. at 555, 94 S.Ct. at 2974.

II. *OFFET* WAS WRONGLY DECIDED

A. *Offet* is Inconsistent with Congressional Intent.

"[T]he initial question whether exhaustion is required should be answered by congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Patsy*, 457 U.S. at 501–02, 102 S.Ct. at 2560 (emphasis added); *Coit Independence v. FSLIC*, 489 U.S. —, —, 109 S.Ct. 1361, 1372, 103 L.Ed.2d 602, 619 (1989).

Section 1983 provides every citizen with a federal civil remedy in federal court for the violation of federal rights. Section 1983 allows immediate access to federal court and does not include any requirement that state remedies be exhausted.[6]

The history of section 1983 reveals that Congress intended the federal courts to assume a primary role in the guarantee of federal rights. Section 1983 is "an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment." *Mitchum v. Foster*, 407 U.S. 225, 238–42, 92 S.Ct. 2151, 2160–62, 32 L.Ed.2d 705 (1972). Opponents of the Civil Rights Act of 1871 had objected that it unfairly invaded the province of the states. *Id.* at 241–42 & n. 32, 92 S.Ct. at 2161–62 & n. 32.[7] Congress brushed aside these criticisms and enacted what has become section 1983 pursuant to its powers under the fourteenth amendment to secure due process of law. *Steffel v. Thompson*, 415 U.S. 452, 464 n. 13, 94 S.Ct. 1209, 1218 n. 13, 39 L.Ed.2d 505 (1974). "... Congress clearly conceived that it was altering the relationship between the States and the

> son within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

7. *See generally* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L.Rev. 1, 6–7 (1985) (history).

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Nation with respect to the protection of federally created rights.... The *very purpose* of § 1983 was to interpose the federal courts between the States and the people...." *Mitchum v. Foster*, 407 U.S. at 242, 92 S.Ct. at 2162 (emphasis added).

Section 1983 and the writ of habeas corpus reflect Congress's decision to provide all Americans, including prison inmates, with the right to have a federal court ultimately decide the scope of their federal rights. Congress has required prisoners to exhaust state remedies in only two circumstances: in habeas corpus claims under 28 U.S.C. § 2254(b) and in 1983 actions in states with grievance procedures which conform to federal standards. 42 U.S.C.A. § 1997e(a) (1981).[8] Under section 1997e, a prisoner's 1983 claim must be stayed for ninety days by a federal district court pending state administrative review of the prisoner's grievance. In all other circumstances, Congress has intended that federal court jurisdiction for prisoners' section 1983 suits be immediately available. *Patsy*, 457 U.S. at 512, 102 S.Ct. at 2565.

Initially, congressional intent with respect to section 1983 exhaustion is clearly revealed in the legislative history of section 1997e. The President's Crime Commission and private studies had recommended the establishment of prison grievance mechanisms as a means of enabling prison authorities to anticipate internal problems and as an aid to good morale. 125 Cong. Rec. 12491 (1979) (remarks of Rep. Drinan). Adoption of prison grievance procedures is voluntary under section 1997e; the purpose of 1997e was to provide incentives to the states "to stimulate the development and implementation of effective administrative mechanisms for the resolution of grievances in correctional and pretrial facilities...." H.R.Rep. No. 96-80, 96th Cong., 1st Sess. 4 (1979) (House Report). The House Judiciary Committee anticipated that "[t]he effect of H.R. 10 would be to improve the quality of life for institutionalized persons, and to assist in relieving the caseloads of Federal courts in prisoner petitions." *Id.* The exhaustion requirement of section 1997e was suggested by the minority members of the Judiciary Committee, was "strongly endorsed by the States," and passed with bipartisan support. 124 Cong. Rec. 11976 (1978) (remarks of Rep. Kastenmeier); House Report at 3.[9]

Offet is inconsistent with section 1997e in two ways. First, *Offet* overwhelms the incentive Congress offered the states to develop grievance mechanisms. Congress concluded that the development of state prison grievance procedures was desirable and offered essentially an administrative exhaustion rule as an incentive for the adoption of state grievance procedures. *Offet*, however, allows state prison authorities to subject prisoner claims to state judicial exhaustion without participation in the section 1997e program. While there are non-disciplinary grievances, states will have less incentive to certify their grievance procedures when the effect of *Offet* is understood. "This purpose would be frustrated by judicial discretion to impose exhaustion generally: the States would have no incentive to adopt grievance procedures capable of certification...." *Patsy*, 457 U.S. at 511-12, 102 S.Ct. at 2565.

Second, *Offet* is inconsistent with Congress's understanding when it enacted section 1997e. The hearings and debates are replete with recognition that exhaustion is generally not required of prisoner com-

8. This section was enacted as part of the Civil Rights of Institutionalized Persons Act, Pub.L. No. 96-247, 94 Stat. 349 (1980). The Act also granted the Attorney General of the United States the power to investigate and prosecute alleged deprivations of the civil rights of persons residing in state institutions.

9. Within our circuit, only Iowa and Nebraska have been certified in compliance with federal standards. Iowa's procedures were certified in July 1985. Nebraska was certified in September 1987. Missouri first applied for certification in May 1987 and was granted conditional certification in June 1988. States that have been certified pursuant to section 1997e show a decline in prisoner petitions. *See* Annual Report of the Director of the Administrative Office of U.S. Courts, Appendix I, Detailed Statistical Tables, table C-3; *see also* Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 Iowa L.Rev. 935, 938, 944 (1986) (noting decline in 1983 suits).

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under section 1983. "For many years, some of us have felt that the requirement of exhaustion of remedies would be desirable in the case of 1983 actions, but for various reasons it has been impossible to implement this requirement. The bill, however, makes a modest approach at an exhaustion of remedies requirement." 124 Cong.Rec. 23180 (1978) (remarks of Rep. Ertel).[10]

The Supreme Court recognized the intent of Congress in *Patsy v. Florida Board of Regents*, a decision not considered by *Offet*. In *Patsy*, the Court extensively reviewed the legislative history of section 1997e and determined to require exhaustion of administrative remedies in a section 1983 suit. 457 U.S. at 507-12, 102 S.Ct. at 2563-66. The Court concluded that with 1997e, Congress believed it was creating an exception to exhaustion rules, and that "[i]mplicit in this decision is Congress's conclusion that the judicial exhaustion rule should be left standing with respect to other § 1983 suits." *Id.* at 516, 102 S.Ct. at 2564.

Section 1997e and its legislative history demonstrate that Congress understood that exhaustion is not generally required in § 1983 actions, and that it decided to carve out only a narrow exception to this rule. A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.

at 508, 102 S.Ct. at 2563. Justice Connor, joined by Justice Rehnquist, concurred, expressing the hope that Congress would consider expanding exhaustion requirements. *Id.* at 516-17, 102 S.Ct. at 2568 (O'Connor, J., concurring).

Next, *Offet* is inconsistent with congressional intent because it effectively prevents some prisoners from ever having their legal claims adjudicated by a federal court. If a prisoner wants to challenge the legality of any aspect of a disciplinary proceeding in which one sanction imposed affects his release date, *Offet* forces him to go first to state court. If the prisoner loses in state court, he can appeal to a state appeals court. If he loses again, he can file a habeas action in federal court. At the same time, he can file a companion section 1983 action requesting damages, provided the 1983 action is stayed pending resolution of the habeas claims. This procedure can take years. Often the prisoner will no longer be incarcerated by the time state remedies are exhausted and federal court jurisdiction is invoked. Because habeas claims relating to disciplinary decisions can usually be pursued only by confined persons, under *Offet*, many short-term prisoners will be unable to obtain federal court review of the state's legal conclusions. If they pursued state relief first, they will be estopped from seeking damages under section 1983 for asserted violations of their federal rights because federal habeas relief will be unavailable, even though their damage claims are not moot.[11] This is inconsistent with the congressional policy of making available to every citizen federal

10. *See also id.* at 15445 (remarks of Rep. Ertel); House Report at 26, 48 (remarks of Rep. Kastenmeier, subcommittee chairman, and Peggy Weisberg, staff attorney for the A.C.L.U., viewing 1997e as a restriction of prisoner rights); *id.* at 159 (remarks of Rep. Kindness) (opposing expansion of Attorney General powers because individual rights guaranteed by section 1983 provide adequate federal remedy); 125 Cong. Rec. 12496 (1979) (remarks of Rep. Butler). "Concern for the right of the states to have the opportunity to first consider the conditions addressed in the bill was swept aside by the most conservative of congressmen. "I do not intend to wave the flag of no Federal intervention for another 200 years, while the inhumane conditions this legislation seeks to alleviate go on and on." 125 Cong.Rec. 12499 (1979) (remarks of Rep. Hyde).

> [T]his is not a conservative versus liberal question. This is not a question of the federal government overstepping its bounds.... It seems to me that the question of states' rights does not apply here. These are rights the individuals already have. All we are attempting to do is to facilitate the means by which they might bring this question to the forefront. There is no doubt in my mind that one group is probably the one that really has no advocacy here. That is the prisoners of America.
>
> *Id.* (remarks of Rep. Lungren).

11. The relief-based distinction developed in *Preiser* and *Wolff* does not create a similar "gap" in the enforcement of federal rights. If a prisoner is seeking an earlier release and he is released before he can file a federal habeas claim, the case will be moot, absent continuing

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adjudication of the scope of federal civil rights. It also effectively stymies the development of federal law by federal courts.

Finally, *Offet* surrenders control of federal court jurisdiction to state prison officials. It encourages prison officials always to include the loss of good-time credits as a sanction to defeat a prisoner's right to a federal hearing. As the Seventh Circuit concluded in deciding not to follow *Offet*, "... *Offet*, ultimately proves too much.... [T]he state could insulate every imposition of discipline from attack under section 1983 by simply revoking one hour, or one day, of good time as part of every punishment.... We cannot accept such off-hand treatment of the importance to a state prisoner of prompt access to federal court under section 1983...." *Viens v. Daniels*, 871 F.2d 1328, 1333 (7th Cir.1989) (Cudahy, Easterbrook, and Ripple). For example, today the majority concludes that Charles Reese must exhaust state remedies because he was sanctioned with a loss of good-time credits, *ante* at 1308, even though Reese is serving a life term without possibility of parole. By sanctioning Reese with a meaningless loss of good-time credits, his disciplinary committee delayed his access to federal court. In the name of enhancing federal-state comity, *Offet* places control of federal court jurisdiction in the hands of unelected state prison disciplinary committees.

B. *Offet* is Inconsistent with Decisions of the United States Supreme Court.

Offet misconstrues the Supreme Court's decisions in *Preiser* and *Wolff*, and disregards other decisions.[13] In *Wolff*, the Supreme Court reviewed the disciplinary procedures of the Nebraska state prison and established new hearing standards to apply to future cases. 418 U.S. at 555, 94 S.Ct. at 2974–82. The Court dismissed the plaintiffs' claims for restoration of their good-time credits, but held that *Preiser* did not require exhaustion of the inmates' claims for damages and declaratory relief. *Id.* at 554–55, 94 S.Ct. at 2974. Judge Arnold correctly concludes in his dissent that *Preiser* and *Wolff* created a relief-based distinction and that *Offet* misconstrues these two decisions. *See Offet*, 823 F.2d at 1261–63 (Arnold, J., dissenting).[13] In response, *Offet* offers several arguments for distinguishing *Wolff*.

Initially, *Offet* reasons that *Wolff* granted prospective relief only and thus did not allow federal decisions which would constrain state courts. 823 F.2d at 1260. This distinction is unpersuasive. First, a federal court's grant of prospective relief from current prison practice on constitutional grounds would necessarily influence a subsequent state proceeding. It would produce at the very least results indistinguishable from Judge O'Brien's waiver option found "untenable" by today's majority. *Ante* at 1309. Second, *Wolff* cannot be construed as limited to prospective relief because the inmates in *Wolff* sought damages for the past acts of the defendants and the Court concluded that the legal issues underlying their damage claims did not have to be exhausted in state court.

consequences from the state's conduct which may permit continuing habeas jurisdiction. A relief-based distinction is thus not arbitrary in light of the continuing access to federal court it provides prisoners consistent with congressional purpose.

12. *See, e.g., Patsy v. Florida Bd. of Regents*, 457 U.S. at 512, 102 S.Ct. at 2565 (Congress "has taken the approach of carving out specific exceptions to the general rule that federal courts cannot require exhaustion under § 1983."); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 3, 99 S.Ct. 2100, 2102, 60 L.Ed.2d 668 (1979) (deciding merits of section 1983 class action challenging parole procedures); *Gerstein v. Pugh*, 420 U.S. 103, 107 n. 6, 95 S.Ct. 854, 859 n. 6, 43 L.Ed.2d 54 (1975) (request for hearing challenging detention not governed by *Preiser*); *Steffel v. Thompson*, 415 U.S. at 464, 469, 472–73, 94 S.Ct. at 1218, 1220, 1222–23 (allowing federal declaratory relief from impending state prosecution); *Wilwording v. Swenson*, 404 U.S. 249, 251, 92 S.Ct. 407, 409, 30 L.Ed.2d 418 (1971) (per curiam) (state prisoners not held to different standard of exhaustion).

13. I note that the dissenters in *Preiser* believed that this was the Court's holding. *Preiser*, 411 U.S. at 510, 93 S.Ct. at 1846 (Brennan, J., dissenting). Moreover, Judge Bork, who argued *Wolff* before the Supreme Court, held, while a member of the District of Columbia Circuit, that a relief-based test was adopted in *Preiser* and *Wolff*. *Mouli v. Secretary of the Navy*, 793 F.2d 364, 367–68 (D.C.Cir.1986).

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U.S. at 555, 94 S.Ct. at 2974. While the Court limited the application of the newly announced standards, the Court did not foreclose damage claims based on violations of due process apparent at the time of the violation. Accordingly, it cannot be argued that "*Wolff* clearly was intended to be purely prospective in nature ...," 823 F.2d at 1260, nor does limiting *Wolff* to prospective relief resolve federal-state comity problems.

Next, *Offet* argues that *Wolff* had not considered the res judicata effects of federal decisions on subsequent state proceedings. *Wolff* concluded, however, that *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings." 418 U.S. at 554, 94 S.Ct. at 2974. The Court added in an accompanying footnote that "[o]ne would expect that normal principles of res judicata would apply in such circumstances." *Id.* n. 12. *Offet* nevertheless justifies the extension of *Preiser*'s exhaustion requirement based on the unacceptable res judicata effects of a federal ruling on subsequent state proceedings. 823 F.2d at 1258. *Offet* speculates that the Court was simply unaware of the implications of its footnote in *Wolff*, or had not "considered ... fully the preclusive effect of a federal ruling ...," and may have been thinking only of the res judicata effects of state judgments on subsequent 1983 proceedings. 823 F.2d at 1260. The claim that the Court never considered the res judicata effects of a federal decision is absolutely essential to *Offet*'s license to fashion new exhaustion rules consistent with federal-state comity. The claim is, however, unsupportable.

First, the majority in *Wolff* added a footnote discussing res judicata to show that it was aware of the potential implications of its decision and intended no special res judicata rule for 1983 plaintiffs. The Court had been invited to fashion a special res judicata rule by the dissent in *Preiser*, lest the "traditional principles of res judicata" lead to federal and state decisions terminating simultaneous suits in the other forum. *Preiser*, 411 U.S. at 509 n. 14, 511, 93 S.Ct. at 1846 n. 14, 1847 (Brennan, J., dissenting). Instead, in *Wolff*, the Court anticipated the application of "normal" res judicata principles. Under normal res judicata rules, a decision in federal or state court has a preclusive effect in a subsequent proceeding in either forum, except where an exception is created by statute. *See, e.g.*, 28 U.S.C. 2254(d) (limited res judicata effect of state post-conviction decisions). It thus seems clear that the Court understood that federal decisions would have res judicata effects on subsequent state proceedings and accepted that consequence. *Accord Williams v. Ward*, 556 F.2d 1143, 1151, 1153–54 (2d Cir.) (Friendly, J.), *cert. dismissed*, 434 U.S. 944, 98 S.Ct. 469, 54 L.Ed.2d 323 (1977).

Second, the Supreme Court was reviewing a decision of this Court. *See McDonnell v. Wolff*, 483 F.2d 1059 (8th Cir.1973). We construed *Preiser* to create a relief-based distinction between 1983 suits and habeas corpus. *Id.* at 1064. We recognized that a federal decision would have a res judicata effect on state proceedings and concluded that indeed the Court had authorized simultaneous federal and state proceedings.

> We recognize that the above result may mean that the federal courts may often establish minimum due process standards for all types of disciplinary hearings for serious misconduct in state prisons and that there may be simultaneous litigation in state and federal courts, but the Supreme Court anticipated these results would probably occur. *Preiser* ... n. 14....

Id. It is thus highly unlikely that the *Wolff* Court was unaware of the issue or "may have only been thinking of the res judicata effects of state judgments on subsequent 1983 proceedings." *Offet*, 823 F.2d at 1260.

Third, the Supreme Court's decision earlier in the same term in *Steffel v. Thompson* also refutes *Offet*'s gloss on *Wolff*. Steffel sought a declaratory judgment that a prospective state criminal prosecution would violate his constitutional rights. The Court distinguished between the enjoining

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of current state criminal proceedings and declaratory relief in advance of a threatened prosecution, allowing Steffel's suit to go forward. 415 U.S. at 469, 475, 94 S.Ct. at 1220, 1223. Justice Rehnquist, joined by Chief Justice Burger, concurred, expressing the view that the decision did not reach "whether the granting of a declaratory judgment by a federal court will have any res judicata effect...." *Id.* at 479, 94 S.Ct. at 1226 (Rehnquist, J., concurring). He concluded that a federal declaratory judgment would not be res judicata in state court and would not support the issuance of an injunction against state action. *Id.* at 479–85, 94 S.Ct. at 1225–28. Justice White wrote separately to express his disagreement with Justice Rehnquist. "At this writing at least, I would anticipate that a final declaratory judgment entered by a federal court ... should be accorded res judicata effect in any later prosecution of that very conduct." *Id.* at 477, 94 S.Ct. at 1225. This supports the view that the Court understood that federal decisions would have res judicata effects on state proceedings when, three months later, Justice White authored the *Wolff* opinion discussing "normal" principles of res judicata. 418 U.S. at 554 n. 12, 94 S.Ct. at 2974 n. 12.[14]

Wolff clearly limited the scope of *Preiser* and federal-state comity concerns. Although federal decisions have res judicata effects on state proceedings, exhaustion is still not required except in the limited class of *Preiser* cases where only injunctive relief is sought and habeas is a complete substitute. *Offet* simply reads too much into *Preiser*. The subsequent decisions of the Court in *Wolff*, *Greenholtz*, and *Gerstein*, allowing prisoner suits for damages where earlier release from confinement was sought, make it apparent that:

> [A]t least one of the premises of *Preiser* is not absolute: either (1) comity does not bar § 1983 claims that, if successful, would cast doubt on—but not ultimately determine—the constitutionality of state administrative decisions *and* state court convictions or (2) with regard to such claims, state administrative decisions are not always due the same level of deference as state court convictions and sentencing decisions.

Serio v. Louisiana Bd. of Pardons, 821 F.2d 1112, 1116 (5th Cir.1987) (emphasis in original). The Supreme Court's subsequent decisions make clear that *Preiser* represents the limits of the Court's willingness to supplement Congress's pronouncements on exhaustion, and that the relief-based distinction created by Supreme Court decisions is to be followed by this court.[15]

14. *Offet* also argues that the issue of how to separate habeas and 1983 claims was never resolved by *Preiser* and *Wolff* in light of the Court's language in *Tower v. Glover*, 467 U.S. 914, 923, 104 S.Ct. 2820, 2826, 81 L.Ed.2d 758 (1984). *Offet*, 823 F.2d at 1260. I agree that it may not be apparent how *Preiser* and *Wolff* apply to conviction challenges, but *Tower* does not support the view that *Wolff* did not draw a relief-based line with respect to disciplinary proceedings. The plaintiff in *Tower* was an inmate who pursued simultaneously state post-conviction relief and a federal 1983 action for damages against various state officials and two of his former lawyers alleging a conspiracy to convict him. By the time the Court heard the case, his state remedies were exhausted. The Court noted that it thus had "no occasion to decide if a Federal District Court should *abstain* from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." 467 U.S. at 923, 104 S.Ct. at 2826 (emphasis added).

It has long been the rule that federal courts should abstain from interfering in ongoing state criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 43–45, 91 S.Ct. 746, 750–51, 27 L.Ed.2d 669 (1971); *see also Wooley v. Maynard*, 430 U.S. 705, 711, 97 S.Ct. 1428, 1433, 51 L.Ed.2d 752 (1977) (abstain only from reviewing current proceedings); *Gibson v. Berryhill*, 411 U.S. 564, 573–74, 93 S.Ct. 1689, 1695–96, 36 L.Ed.2d 488 (1973) (comity generally counsels that a federal court should not enjoin ongoing proceedings); *Id.* n. 13 (exhaustion policy not strong with respect to non-*Younger* state judicial proceedings). Moreover, as the Court noted, even with respect to conviction disputes, the application of *Preiser* was not reached or argued in *Tower*. *Tower*, 467 U.S. at 923, 104 S.Ct. at 2826. The Court was also careful to note that with respect to section 1983 litigation, Congress retained control of federal jurisdiction. *Id.*

15. No other circuit follows *Offet*. The District of Columbia, First, and Tenth Circuits use the relief-requested test. *See, e.g., Monk v. Secretary of the Navy*, 793 F.2d at 367–68 (D.C.Cir.); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 810 n. 6 (D.C.Cir.1988) (en banc); *Lanier v. Fair*, 876 F.2d 243, 244 n. 1 (1st Cir.1989); *Schuemann v.*

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C. *Offet* is Inconsistent with Past Decisions of this Circuit.

Offet asserts that a conflict exists between prior opinions of this circuit and announces, "[a]ccordingly, we approach this case as one in which our decision will establish the rule for this Circuit." 823 F.2d at 1258. The relation between section 1983 suits and habeas corpus was explored at least nine times by panels of this circuit prior to the decision in *Offet*. There was no prior conflict and the *Offet* panel lacked the authority to announce the rule for the circuit.[16]

We had repeatedly permitted state prisoners to bring in federal court section 1983 damage actions challenging disciplinary decisions which resulted in a loss of good-time credits. *See Brown v. Frey*, 807 F.2d 1407, 1408 (8th Cir.1986); *Graham v. Baughman*, 772 F.2d 441, 443 (8th Cir. 1985);[17] *Eugene v. Klecker*, 636 F.2d 250, 251 (8th Cir.1980) (per curiam); *Glouser v. Parratt*, 605 F.2d 419 (8th Cir.1979) (per curiam); *Kelsey v. Minnesota*, 565 F.2d 503, 506 (8th Cir.1977); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 206, 212 (8th Cir.1974) (loss of good time suffered but relief requested unclear); *see also Smallwood v. Missouri Bd. of Probation & Parole*, 587 F.2d 369, 371 (8th Cir. 1978) (interpreting *Preiser* and *Wolff* to separate damage and injunctive claims); *Inmates v. Greenholtz*, 576 F.2d 1274, 1278 n. 2 (8th Cir.1978) (class action procedural challenge to state parole procedures), *rev'd on other grounds*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *McDonnell v. Wolff*, 483 F.2d at 1064 (relief-based test). The two per curiam opinions cited by *Offet* as evidence of a conflict within this circuit

Colorado, 624 F.2d 172, 173 n. 1 (10th Cir.1980); *Gregory v. Wyse*, 512 F.2d 378, 381 (10th Cir. 1975). Recent panels in the Seventh and Eleventh Circuits indicated that they also thought Supreme Court decisions required a relief-based distinction. *Viens v. Daniels*, 871 F.2d at 1331–33; *Gwin v. Snow*, 870 F.2d 616, 623–24, 627 (11th Cir.1989). The Second, Third, Fourth, and Eleventh Circuits follow an immediate effect test. They require exhaustion when a federal decision would have to directly decide that a loss of good-time credits was in error. *Mack v. Varelas*, 835 F.2d 995, 998–99 (2d Cir.1987); *Williams v. Ward*, 556 F.2d at 1150–51 (2d Cir.); *Georgevich v. Strauss*, 772 F.2d 1078, 1087 (3d Cir.1985) (en banc), *cert. denied*, 475 U.S. 1028, 106 S.Ct. 1229, 89 L.Ed.2d 339 (1986); *Harper v. Jeffries*, 808 F.2d 281, 283–84 (3d Cir.1986); *Todd v. Baskerville*, 712 F.2d 70, 73 (4th Cir. 1983); *McKinnis v. Mosely*, 693 F.2d 1054, 1057 (11th Cir.1982) (per curiam); *see also Young v. Kenny*, 887 F.2d 237 (9th Cir.1989). The Sixth Circuit employs this test when convictions are at issue, but does not when disciplinary procedures are challenged. *See Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir.1985) (per curiam) (attack on conviction controlled by *Preiser* despite prayer for damages); *Feaster v. Miksch*, 846 F.2d 21, 22–24 (6th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 148, 102 L.Ed.2d 120 (1988); *Bills v. Henderson*, 631 F.2d 1287 (6th Cir.1980) (disciplinary proceedings); *see also Buchanan v. Wilson*, 875 F.2d 862 (6th Cir.1989) (No. 88–6386, table; citation limited before courts of Sixth Circuit, 6th Cir.R. 24(c)) (1989 WL 461140, 1989 U.S.App.Lexis 6191) (relief-requested controls). The Seventh Circuit focuses on the core of the dispute, examining the claim to determine if the purpose of the suit is to challenge the revocation of good-time credits. *See Viens v. Daniels*, 871 F.2d at 1330. Where significant other sanctions are imposed, exhaustion of state remedies is not required despite the fact that a favorable decision would cause reinstatement of the prisoner's good-time credits. *Id.* at 1333–34; *see also Scruggs v. Moellering*, 870 F.2d 376, 378–79 (7th Cir.) (suit ancillary to conviction challenge), *cert. denied*, — U.S. —, 110 S.Ct. 371, 107 L.Ed.2d 357 (1989). The Fifth Circuit requires, for reasons of judicial convenience and as a synthesis of past circuit cases, the exhaustion of any 1983 complaint that might lead to the earlier release of any party. *Serio*, 821 F.2d at 1117–19. *But see Williams v. McCall*, 531 F.2d 1247, 1248 (5th Cir.1976) (per curiam) (single procedural claim not subject to exhaustion). Although the Eleventh Circuit accepts as binding many of the Fifth Circuit decisions relied on by *Serio*, it has squarely rejected *Serio*. *See Gwin v. Snow*, 870 F.2d at 625–66.

16. "A decision of a panel of this court is the law of the circuit and we are compelled to follow it." *Dudley v. Dittmer*, 795 F.2d 669, 673 (8th Cir.1986); *accord Foss v. United States*, 865 F.2d 178, 180 (8th Cir.1989); *Brown v. First Nat'l Bank*, 844 F.2d 580, 582 (8th Cir.1988); *United States v. Lewellyn*, 723 F.2d 615, 616 (8th Cir. 1983).

17. Graham was no longer confined by the time we considered his 1983 claim. 772 F.2d at 443 n. 2. Under *Offet*, Graham would have had to exhaust state remedies and proceed by habeas corpus in federal court. His release would have likely ended his suit and denied him a federal hearing. We found his due process claim meritorious and rejected the defendants' qualified immunity claim. *Id.* at 443–47.

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both involved attacks on criminal convictions while state criminal proceedings were still pending and thus did not create a conflict with cases involving disciplinary proceedings.[18]

Accordingly, prior to *Offet*, the clear rule in this circuit was that a 1983 complaint attacking a criminal conviction was subject to abstention or exhaustion.[19] If a prisoner was not attacking his original conviction, whether exhaustion was required was determined by the type of relief sought.[20] If there was a prior conflict in our decisions, the *Offet* panel should have referred the issue to the court sitting en banc.

Until en banc review, we must adhere to our first decided case, consistent with the rule that no panel can overturn a previous panel decision. *United States v. Edelman*, 873 F.2d 791, 794 (5th Cir.1989); *Johnson v. Moral*, 843 F.2d 846, 847–48 (5th Cir. 1988).[21] *Offet* thus cannot announce the rule for the circuit nor can it be relied on, but it has created a present conflict requiring en banc review.

III. *OFFET* SHOULD NOT BE EXTENDED TO TODAY'S CASES

Today's decision greatly expands the scope of *Offet* in three respects. Even if I were obliged to follow *Offet*, I would disagree with these applications of it.

A. Procedural Claims.

Mahers' complaint raised several due process challenges to his disciplinary hearing. For example, he argued that he was

18. *Miner v. Brackney*, 719 F.2d 954 (8th Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 856 (1984); *Franklin v. Webb*, 653 F.2d 362 (8th Cir.1981) (per curiam). In *Miner*, the plaintiff filed a 1983 claim for damages and injunctive relief while his state criminal proceedings were still ongoing, alleging that a witness report was false. We affirmed the dismissal of this suit because it required intervention into ongoing criminal proceedings. We noted that exhaustion was not generally required under section 1983, except "when disposition of the civil suit would require federal intervention in a matter presently pending in state court.... [T]he federal court must weigh the potential disruption of the orderly administration of criminal justice against potential harm to the litigant." 719 F.2d at 956 (citing *Younger v. Harris*, and three cases from other circuits, all of which distinguished between challenges to convictions and disciplinary proceedings). *Franklin* also involved a section 1983 challenge to a conviction before state criminal proceedings had ended. 653 F.2d at 363 ("Franklin asserts in his response to the show cause order that the district court improperly applied the abstention doctrine to this case."). *See also Feeney v. Auger*, 808 F.2d 1279, 1280–81 (8th Cir.1986) (applying *Preiser* to 1983 attack on constitutionality of habitual offender statute).

19. This first principle requires a restrained reading of *Wolff*, applying as it does to claims for noninjunctive relief. It also tends to merge abstention and exhaustion doctrines for reasons of federal-state comity. In my view, however, it best reflects Congress's intent when it required exhaustion of habeas corpus claims.

20. This requires a restrained reading of *Preiser*, drawing as it does a distinction between convictions and other state functions. *See Preiser*, 411 U.S. at 491–92, 93 S.Ct. at 1837. This distinction, however, was clearly drawn by Congress after *Preiser* when, with section 1997e, it enacted different exhaustion rules for prisoner 1983 suits than for habeas corpus relief. It has also been drawn subsequently by the Court. *See supra* note 12. Most circuits also distinguish between challenges to convictions and other 1983 suits. *See Monk v. Secretary of the Navy*, 793 F.2d at 367–68 (D.C.Cir.); *Fernandez v. Trias–Monge*, 586 F.2d 848, 852 n. 4 (1st Cir.1978) (pre-trial detention); *Hamlin v. Warren*, 664 F.2d 29, 31–32 (4th Cir.1981), *cert. denied*, 455 U.S. 911, 102 S.Ct. 1261, 71 L.Ed.2d 451 (1982); *Hadley v. Werner*, 753 F.2d at 516 (6th Cir.); *Bills v. Henderson*, 631 F.2d at 1291, 1299 (6th Cir.); *Scruggs v. Moellering*, 870 F.2d at 379 (7th Cir.); *Crump v. Lane*, 807 F.2d 1394, 1400 n. 3 (7th Cir.1986); *Parkhurst v. Wyoming*, 641 F.2d 775, 777 n. 1 (10th Cir.1981); *Gwin v. Snow*, 870 F.2d at 626 (11th Cir.).

21. There may be situations in which a Supreme Court decision or legislative act clearly supersedes a past opinion of this court. In such a case, a panel may deviate from the prior circuit opinion. This is not such a case. While rehearings en banc are to be granted only rarely, 8th Cir.R. VI(D), a panel decision that conflicts with past decided cases is appropriate for a rehearing en banc.

> A petition requesting or suggesting hearing or rehearing en banc should be filed only when the attention of the entire court need be directed to an issue of grave constitutional dimension or exceptional public importance or to an opinion that directly conflicts with prior Supreme Court or Eighth Circuit precedent. 8th Cir.R. 16(c).

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d access to evidence considered by the linary committee, alleging that he old that he would have to pay for s to be made before he could see the ments. Complaint at 6 (No. 86–408–E) 2, 1985). Due process challenges to ing procedures such as this go to the ner, not the outcome, of the proceed- If successful, Mahers might receive a hearing. While Mahers surely hopes ventually have any and all sanctions d as the result of a fair hearing, it is certain or even probable that state au- rities will restore his good-time credits. xhaustion should not be required in this for several reasons. First, post-*Preiser* Supreme Court decisions have not ved due process challenges to prison ciplinary procedures or parole proce- res as challenges to the fact or duration confinement. *See Greenholtz*, 442 U.S. 8, 99 S.Ct. at 2102 (permitting section 83 suit to proceed challenging the parole rocedures used where the duration of con- nement was thus implicated); *Gerstein*, 20 U.S. at 107 n. 6, 95 S.Ct. at 859 n. 6; *Wolff*, 418 U.S. at 555, 94 S.Ct. at 2974 disciplinary).[22] Second, this court and oth- circuits have also made this distinction. *Greenholtz*, we expressly distinguished etween attacks on the manner as opposed the outcome of prison proceedings. *In- ates v. Greenholtz*, 576 F.2d at 1278 n. 2. *But see Preiser*, 411 U.S. at 480–81, 93 S.Ct. at 1831–32. To the extent that *Preiser* is read to ubject procedure claims to exhaustion, it leaves the relief-based distinction as the only way to explain the differing results of these Supreme Court cases.

See, e.g., Brown v. Frey, 807 F.2d at 1409; *Graham v. Baughman*, 772 F.2d at 443; *see also Burnside v. White*, 760 F.2d 217 (8th Cir.), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 576, 88 L.Ed.2d 559 (1985):

> The role of this Court in the present case is not to make the determination whether we, sitting as the Board of Parole, would have chosen to release Burnside, but rather to determine whether the decision not to release Burnside was made in accordance with the demands of the Constitution. This Court plainly has both the power and duty to undertake that review.

Id. at 219.

24. *See Lanier v. Fair*, 876 F.2d at 244 n. 1 (1st Cir.); *Williams v. Ward*, 556 F.2d at 1150 (2d Cir.); *Georgevich v. Strauss*, 772 F.2d at 1086 (3d Cir.); *Todd v. Baskerville*, 712 F.2d at 73 (4th Cir.) (distinction depends on source of damages alleged); *Williams v. McCall*, 531 F.2d at 1248 (5th Cir.); *Bills v. Henderson*, 631 F.2d at 1291, 1299 (6th Cir.); *Hanson v. Heckel*, 791 F.2d 93, 96 n. 6 (7th Cir.1986) (per curiam); *Clutchette v. Procunier*, 497 F.2d 809, 812–13 (9th Cir.1974), *as modified*, 510 F.2d 613 (1975), *rev'd on different grounds sub nom. Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); *Candelaria v. Griffin*, 641 F.2d 868, 869 (10th Cir.1981) (per curiam); *Gwin v. Snow*, 870 F.2d at 624 (11th Cir.); *see also Monk v. Secretary of the Navy*, 793 F.2d at 367 (D.C.Cir.) (broader rule); *but see Serio*, 821 F.2d at 1117–18 (5th Cir.).

25. Only two published decisions of this circuit since *Offet* have applied *Offet* to require exhaustion of state remedies. *Lumpkin v. McKennon*, 882 F.2d 342 (8th Cir.1989) (per curiam); *Jones v. Smith*, 835 F.2d 175 (8th Cir.1987) (per curiam). Both cases appear to have involved chal-

If this distinction was incorrect, surely the Supreme Court would not have decided the merits in that case. Other decisions of this circuit have also allowed inmate due process challenges to disciplinary proceedings,[23] as has nearly every other circuit.[24] Third, state authorities retain the right to fix the prisoner's period of confinement. The federal court would, at most, order only a new hearing. The majority, however, seemingly relying on *Offet*, reaches a different conclusion.

Offet requested a declaration that a recent state law requiring the forfeiture of one day of good-time credit for every day served in punitive confinement was an ex post facto law as applied to him. 823 F.2d at 1257. He did not challenge any particular disciplinary or parole proceeding or disciplinary or parole procedures generally. It is not surprising, therefore, that the *Offet* panel chose to reject the use of the procedure/outcome distinction in "cases such as this one," 823 F.2d at 1259, since Offet did not challenge hearing procedures. Yet, today's decision apparently reads *Offet* as already having decided that a distinction can never be drawn between procedural attacks and challenges to the outcome of the hearings. *Ante* at 1308–1309. The majority does not explain its reasoning. The result, however, suggests a wholesale expansion in *Offet*'s scope.[25]

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With today's decision in *Mahers*, *Offet* now seemingly stands for the proposition that exhaustion is required when a federal decision might indirectly lead to a change in the duration of confinement by requiring reconsideration of a prisoner's status according to lawful procedure. This represents an expansion of *Offet* from those situations where the federal judgment directly decides whether a loss of good time is warranted to cases where state authorities still make that decision. It cannot be justified by the reasoning of past precedent. It ignores the Supreme Court's own interpretation of the "fact or duration" of confinement in *Greenholtz*, *Gerstein*, and *Wolff*. I am at a loss to explain this result or how this panel could have the authority to disregard recent decisions of this circuit.

B. Cause and Prejudice.

In *Goff v. Nix*, *Walton*, *Reese*, and *Burgin*, the majority requires the prisoners to show cause and prejudice for failing to exhaust state remedies. The cause and prejudice test was developed in habeas cases to preserve the integrity of state trials against the sandbagging of issues. *Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S.Ct. 2497, 2507, 53 L.Ed.2d 594 (1977); *id.* at 91–94, 97 S.Ct. at 2509–10 (Burger, C.J., concurring). In my view, it has no application to pro se 1983 suits. The joining of *Wainwright v. Sykes* with *Offet* completes the de facto imposition of an exhaustion requirement on section 1983 plaintiffs, clearly inconsistent with controlling authority. Where there is a default, the majority bars any federal hearing on a prisoner claim even where state relief is unavailable.

Moreover, those prisoners, who have no legal training and only limited direct access to legal materials, should not be held at fault for failing to anticipate *Offet*. There is sufficient cause in the manifest unfairness of applying *Offet* retroactively to prisoners who could not anticipate its result, where previous case law had led them to believe that exhaustion was not required and where the state statute of limitations has expired, leaving them no state or federal forum to hear the merits of their claims. *See Reed v. Ross*, 468 U.S. 1, 14–15, 104 S.Ct. 2901, 2909–10, 82 L.Ed.2d 1 (1984) (changes in the law provide cause); *Fay v. Noia*, 372 U.S. 391, 426–27, 83 S.Ct. 822, 842–43, 9 L.Ed.2d 837 (1963) (ultimate power to review unconstitutional acts).

C. Life Prisoners.

Charles Reese is presently serving a life sentence and is ineligible for parole. *See* Iowa Code Ann. § 902.1 (West Supp.1989). He can be released from custody only if the governor commutes his sentence. His complaint does not implicate the fact or duration of confinement because in his case the receipt or loss of good-time credits is meaningless. The application of *Offet* to Reese accords talismanic effect to good-time penalties where there is no real change in the duration of confinement. It opens the door to the meaningless award and the meaningless revocation of the good-time credits of life prisoners as a means of hindering their access to federal court.

IV. CONCLUSION

Since Congress enacted the habeas exhaustion requirement of 28 U.S.C. 2254 in 1948, the reach of the "Great Writ" has grown. It is only relatively recently that prisoners have been allowed to challenge disciplinary decisions in a habeas action. Habeas corpus has not, however, effectively supplanted section 1983 as a remedy for prisoners because habeas remedies are limited to changes in the duration of confinement. Only when no other relief is desired can a habeas petition ever be the functional equivalent of a section 1983 action. Only because no damages were requested in *Preiser* was the Court able to view habeas as the proper avenue for those plaintiffs' claims. *Preiser* is thus best understood as effectuating congressional control of ex-

lenges to the sufficiency of the evidence. Two other decisions did not reach the exhaustion issue. *Sprouse v. Babcock*, 870 F.2d 450 (8th Cir.1989) (good-time credits restored by prison authorities); *Manis v. Sterling*, 862 F.2d 679, 680 (8th Cir.1988) (complaint insufficient to state a claim).

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...ustion requirements. *Preiser*, 411 U.S. ...489–90, 93 S.Ct. at 1836.

Offet subjects damage claims to exhaus... and cannot be justified as merely following the logic of *Preiser*. *Preiser* did ...announce a policy to construe section ...3 consistently with an independent judi... policy of federalism. The Supreme ...ourt, in fact, usually construes section ...3 as exempt from federal-state comity ...ncerns.[24] Nor has Congress ordered our ...diction with only states' rights in mind. ... Judge Arnold suggested in dissent, ...perhaps the answer is that the policy ...oring exhaustion is not the only policy ...erating in this area. There is also a ...icy, stated by Congress in § 1983, mak... available a federal forum for actions ...mplaining of deprivation of federal rights ...nder color of state law." *Offet*, 823 F.2d ... 1262.

The Supreme Court has repeatedly indi...ated that the balancing of these policy ...onsiderations should be left to legislative ...ontrol. "It is for Congress to determine ...hether § 1983 litigation has become too ...urdensome to state or federal institutions ...nd if so, what remedial action is appropri... *Tower v. Glover*, 467 U.S. at 923, 104 ...Ct. at 2826; *see also Patsy*, 457 U.S. at ...12, 102 S.Ct. at 2565 (policy arguments ...garding judicial workload, federal-state ...mity, and state expertise cannot justify ...judicial imposition of exhaustion re...irements). Proposals for changes in ...soner exhaustion rules are thus properly ...ddressed to Congress, not the courts. *Id.* ...513, 102 S.Ct. at 2565. *Offet*, however, ...rt circuits the political process. Justice ...ackmun has remarked:

> My second response to the criticisms ...oncerning the impact of § 1983 on fed...ralism is that to the extent the statute ...does create problems, those problems are ...olitical rather than judicial. It is not ...mproper, of course, to take issue with ...the balance struck by the Reconstruction ...Congresses, nor is it improper to call for ...

...*See Mitchum v. Foster*, 407 U.S. at 242, 92 ...S.Ct. at 2162 (exempt from limits of the Anti-In...unction Act). "Congress has taken the ap...proach of carving out specific exceptions to the ...general rule that federal courts cannot require greater deference toward the States. We must recognize, however, that such arguments are better addressed to Congress than to the courts. It is not enough to argue before a court that a particular construction of § 1983 is inconsistent with "principles of federalism" or "federal-state comity." To do so is to put the cart before the horse, for the only principles of federalism and comity that justify restricting the scope of § 1983 are those found in the Constitution or § 1983 itself. We must avoid the temptation to let "federalism" become the Natural Law of the 1980's, a brooding omnipresence to which duly enacted statutes are made to pay homage. Indeed, there is more than a little irony in litigants' and commentators' asking the Supreme Court to restrict the scope of § 1983 in order to prevent unwarranted intrusions on the democratic processes of state governments. If § 1983 as presently construed does shift political authority from elected officials to unelected judges—and I do not concede that it does—the remedy, it seems to me lies with the elected members of the Senate and House of Representatives and not with the unelected members of the Supreme Court.

Blackmun, *Section 1983*, 60 N.Y.U.L.Rev. at 23 (emphasis added).

The Constitution gives Congress the power to determine the scope of our jurisdiction. Ultimately, the validity of *Offet* must rise or fall based on *Offet*'s accuracy in faithfully and respectfully construing congressional intent. Nowhere in the text of *Offet* is that task undertaken.

WEST KEY NUMBER SYSTEM

exhaustion under § 1983. It is not our province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983." *Patsy*, 457 U.S. at 512, 102 S.Ct. at 2565.

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031788ET

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

RICK DEAN BRESSMAN,)
)
Plaintiff,)
)
vs.)
)
HAL FARRIER, et al.,)
)
Defendants.)

FILED
CEDAR RAPIDS HOOTRS OFFICE
NO. C 87-01[illegible]ORTHERN DISTRICT OF IOWA

ORDER MAR 22 1988
10:30 a.m.
WILLIAM J. KANAK - Clerk
By: [signature] Deputy

This matter is before the court on the defendants' motion for stay, filed September 8, 1987, and the plaintiff's resistances, filed October 2, 1987 and January 7, 1988.

The plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 to redress alleged constitutional violations, including loss of good time credits, and seeks damages. While a § 1983 case usually need not be stayed or dismissed pending exhaustion of state remedies, a suit seeking to redress the loss of good time credits must be stayed for that reason, since it is in the nature of a habeas corpus action. Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987). The key in determining whether to stay the case is whether a determination of the § 1983 action would "establish an irrefutable claim" for recovery of good time credits. Offet, 823 F.2d at 1258.

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Under Offet, the court need not stay the entire case, but only those claims which would be binding in a subsequent habeas corpus petition. Any remaining claims need not be stayed. This is analogous to a joint habeas corpus - § 1983 petition. In such a case, the court must dismiss the habeas corpus claim pending exhaustion of state remedies. 28 U.S.C. § 2254. The remaining § 1983 claims need not be dismissed but may be heard by the federal court. Preiser v. Rodriguez, 411 U.S. 475, 499 n. 14 (1973). Therefore, the court must determine which claims, if any, must be stayed pursuant to Offet. Should the court find that a determination on the validity of the underlying disciplinary proceeding for purposes of money damages precludes "state consideration of the same issue in a subsequent state proceeding," Offet 823 F.2d at 1258, then that claim will be stayed pending exhaustion of state remedies.

All prison mail, other than legal correspondence, is monitored by prison officials. In the complaint, the plaintiff alleges that his constitutional rights were violated by the confiscation of a letter he wrote to his brother. The contents of the letter were found by prison officials to violate prison rules, and the plaintiff was placed in solitary confinement. Therefore, any claim by the plaintiff which would call for a constitutional determination on the contents of the letter would have a direct bearing on the validity of the underlying disciplinary proceedings. Any ruling in plaintiff's favor in

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regard to the contents of the letter would overturn the findings of the disciplinary committee and effect a change in plaintiff's conditions of confinement. These claims would have to be stayed pending exhaustion of state remedies pursuant to Offet.

The plaintiff breaks down the complaint into four issues: (1) whether the letter constituted verbal abuse under prison rules or whether it was protected constitutional expression; (2) whether plaintiff's rights were violated by the prison officials' refusal to send the letter to his brother; (3) whether plaintiff's constitutional rights were violated by the failure of prison officials to notify plaintiff's brother that the letter had been intercepted; and (4) whether the confiscation of the letter violated plaintiff's constitutional rights.

Of the four issues, issues one, two and four would place the contents of the letter before the court. While the refusal to send and the confiscation of mail are not directly linked with plaintiff's time in solitary, these issues can only be determined by examining prison policy and the contents of the letter. If the court would find that the contents did not violate prison rules, the letter should not have been confiscated and it should have been sent to plaintiff's brother. The court finds that a ruling on any of these issues would affect the validity of the underlying disciplinary proceedings. Therefore, this court finds that the first, second and fourth issues must be stayed pursuant to Offet.

The plaintiff's right to have the receiving party notified of the letter's interception has no bearing on the validity of the disciplinary proceedings. The court need not examine the contents of the letter to determine the question. A favorable ruling for plaintiff on this narrow issue would not result in the recovery of good time credits. Offet does not require the third issue to be stayed.

ORDER:

Accordingly, It Is Ordered:

1. The defendant's motion for stay, filed September 8, 1987, is granted in part and denied in part. Issues one, two and four, as outlined in the text, are stayed in accordance with Offet v. Solem pending exhaustion of state remedies. Issue three does not require exhaustion, and the motion for stay is denied as to that issue.

2. Issues one, two and four are dismissed without prejudice unless the plaintiff commences his state remedy action and reports on the status of the state action to this court within sixty (60) days of the date of this order. The plaintiff is specifically advised that if he fails to commence his state action within the sixty (60) days provided for by this order, he risks the running of the statute of limitations on his 42 U.S.C. § 1983 claims.

3. The plaintiff is to file a supplemental report on the status of the state action every ninety (90) days thereafter or face dismissal.

Done and Ordered this 22 day of March, 1988.

David R. Hansen, Judge
UNITED STATES DISTRICT COURT

Clerk To Furnish Copies To:

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Copy sent by cert. mail on March 22, 1988 to the attorneys listed above.

Deputy Clerk

032488DeJMB

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

IN RE: OFFET MOTION CASES.	
GEORGE GOFF, Plaintiff, vs. CRISPUS NIX and HAROLD FARRIER, Defendants.	CIVIL NO. 84-725-E
GEORGE GOFF, Plaintiff, vs. STEVE DAILEY, Superintendent of Clarinda, et al., Defendants.	CIVIL NO. 87-821-E
LAURENCE BURGIN, Plaintiff, vs. HAL FARRIER, et al., Defendants.	CIVIL NO. 87-384-E

COPIES TO COUNSEL

RONALD W. BREWER, Plaintiff, vs. JOHN HENRY, et al., Defendants.	)	CIVIL NO. 87-648-E
RONALD A. MAHERS, Plaintiff, vs. CRISPUS C. NIX, et al., Defendants.	)	CIVIL NO. 86-408-E
CHARLES O. REESE, Plaintiff, vs. HAL FARRIER, et al., Defendants.	)	CIVIL NO. 87-448-E
CHESTER WALTON, JR., Plaintiff, vs. CRISPUS C. NIX, et al., Defendants.	)	CIVIL NO. 86-383-E

O R D E R

The above-entitled actions are § 1983 suits filed by state prisoners in which the defendants have filed motions to stay proceedings in light of the Eighth Circuit's recent decision in Offet v. Solem, 823 F. 2d 1256 (8th Cir. 1987). Because these motions raise common legal issues, the Court has consolidated these cases for purposes of deciding whether the Offet stays are warranted, and held a single hearing in which all parties were represented by counsel. The Court rules in Part II of this order that a faithful reading of Offet would only support the issuance of a stay in one of these cases, Goff v. Dailey, 87-821-E, so that stays will not be granted in any of the other cases. The Court further rules in Part III of this order that the problem posed by the Goff case can best be resolved by an approach which the Offet court did not consider, and therefore denies the Offet motion in that case as well.

In one way or another, each of these suits involves disciplinary actions instituted against the plaintiffs in state prison. Most of the cases allege that procedural due process rights were not respected during disciplinary hearings. See Reese v. Farrier, 87-448-E; Burgin v. Farrier, 87-384-E; Maher v. Nix, 87-408-E; Walton v. Nix, 86-383-E; Goff v. Nix, 84-725-E. Two complaints allege the plaintiffs were deprived of liberty for constitutionally impermissible reasons, such as a threat to file a lawsuit or giving testimony against state officials. See Goff v. Dailey; Brewer v. Henry, 87-648-E. The Brewer case is also unique because it challenges the constitutionality of detention imposed prior to the institution of disciplinary proceedings. In each

case, disciplinary action taken against the plaintiff has affected the plaintiff's good-time credits, but the plaintiff has not initiated state proceedings to seek restoration of those credits. Instead, the plaintiffs have filed § 1983 suits in federal court. Each of their complaints includes a prayer for damages arising from a perceived violation of the U. S. Constitution.

The defendants contend that the Eighth Circuit's Offet decision makes exhaustion of state court remedies an absolute prerequisite in any § 1983 action which seeks to challenge prison disciplinary actions which resulted in the loss of good-time credits. For this reason, they have moved to stay proceedings in each case until the plaintiff exhausts such remedies, presumably in an action under Iowa Code § 663A for post-conviction relief.

I.

Because the defendants rely solely upon the Offet decision, the Court must first decide precisely what the Eighth Circuit held in Offet.[1] In Offet a state prisoner brought a § 1983 action in federal court alleging that an amendment to a South Dakota statute concerning forfeiture of good-time credits, as applied to him, violated the ex post facto clause of the U. S. Constitution. He sought damages as well as declaratory and injunctive relief. The district court dismissed his entire claim, and he appealed. A panel of the Eighth Circuit Court of Appeals held, with Judge Arnold dissenting, that the district court should have stayed the plaintiff's entire § 1983 claim until he pursued existing state procedures for raising the constitutional issues. There was

[1]The plaintiffs and defendants in these cases have interpreted the Offet decision in widely divergent ways.

little question that the plaintiff could not directly attack the length of his confinement or seek a restoration of good-time credits in a § 1983 action. Such relief has only been available in federal court under a writ of habeas corpus, and the federal habeas corpus statute, 22 U.S.C. § 2254, requires prospective petitioners to first exhaust available state remedies. But until Offet, the greater weight of authority in this circuit[1A] permitted plaintiffs to raise the same constitutional issues in a § 1983 damages action without any requirement of prior exhaustion of state remedies pursuant to the U. S. Supreme Court's holding in Wolff v. McDonnell, 418 U. S. 539, 554 (1974). The Offet court's best reasons for departing from the explicit holding of Wolff rest on a critical assumption concerning collateral estoppel law:

> Our adjudication of the constitutional issue on Offet's claim for damages and declaratory relief under § 1983 could be used as a basis for issue preclusion in a subsequent habeas corpus proceeding in state court. See

[1A]See Malek v. Camp, 822 F. 2d 812 (8th Cir. 1987); Brown v. Frey, 807 F. 2d 1407 (8th Cir. 1986); Clark v. Brewer, 776 F. 2d 226 (8th Cir. 1985); Graham v. Baughman, 772 F. 2d 226 (8th Cir. 1985); Harmon v. Auger, 768 F. 2d 270 (8th Cir. 1985); Mosby v. Mabry, 697 F. 2d 213 (8th Cir. 1982); Wilson v. State of Iowa, 636 F. 2d 1166 (8th Cir. 1981); Eugene v. Klecker, 630 F. 2d 250 (8th Cir. 1980); Glouser v. Parratt, 605 F. 2d 419 (8th Cir. 1979); Smallwood v. Missouri Board of Probation and Parole, 587 F. 2d 369, 371 (8th Cir. 1978); Inmates of Nebraska Penal and Correctional Complex v. Greenholtz, 576 F. 2d 1274, 1278 n. 2 (8th Cir. 1978), reversed on other grounds, 442 U. S. 1 (1979); Kelsey v. State of Minnesota, 565 F. 2d 503 (8th Cir. 1977); Kelly v. Brewer, 525 F. 2d 394 (8th Cir. 1975); Finney v. Arkansas Board of Corrections, 505 F. 2d 194 (8th Cir. 1974); Johnson v. Wolff, 501 F. 2d 407 (8th Cir. 1974). But see Miner v. Brackney, 719 F. 2d 954 (8th Cir. 1983), cert. denied, 467 U. S. 1259 (1984); Franklin v. Webb, 653 F. 2d 362 (8th Cir. 1981)(per curiam).

> Dunham v. First National Bank, 260 N. W. 2d 375, 379 (S.D. 1977)(prior federal ruling collaterally estops state court from adjudicating same issue); see also American Fabrics, Inc. v. L & L Textiles, Inc., 754 F. 2d 1524, 1529 (9th Cir. 1985).

823 F. 2d at 1258. To prevent Mr. Offet from using section 1983 to achieve indirectly what he could not achieve directly under that statute, the Offet panel headed him off at the pass, and denied him an opportunity to bring his claims under section 1983 until he exhuasted state remedies for restoring good-time credits. 823 F. 2d at 1261. Specifically, it held:

> Because a prisoner who wins a section 1983 action in federal court for damages or declaratory relief for the unconstitutional deprivation of good-time credits thereby establishes an irrefutable claim for early or immediate release under habeas, we hold that in such a case the federal court should stay the section 1983 claim until the plaintiff has satisfied the exhaustion requirement with respect to the underlying constitutional issue.

Id.

The Offet panel emphasized that if the plaintiff prevailed under section 1983, issue preclusion would be mandatory and inevitable, so that the prisoner would thereby establish "an irrefutable claim for early or immediate release under habeas." Id. It chose the terms "ineluctabl[e]" and "automatic[]" to describe the link between success in a section 1983 suit and a shortening of the length of the plaintiff's sentence. Nevertheless, the defendants believe that these terms are not a part of the Offet court's holding. They contend that Offet stays should be available when these effects are anything but certain, and have sought stays under circumstances in which a restoration of good-time credits and a shortening of a confinement are only remote possibilities. In their view, the possibility that a section 1983 judgment might be used for preclusive

purposes is sufficient by itself to warrant a stay in order to further "principles of comity and federalism" and to avoid friction between federal and state court systems.

There are at least five good reasons why the Offet decision cannot be read so broadly. First, "federal courts have a virtually unflagging obligation to exercise their jurisdiction except in those extraordinary circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." Deakens v. Monaghan, No. 86-890, slip op. at 9 (U.S. Jan. 12, 1988). Thus, an interpretation of Offet which would prevent the court from exercising any meaningful consequences of its jurisdiction in the quite ordinary circumstances presented in these cases must be viewed with suspicion.[2] Second, if the Offet court did not really care about the supposed inevitability of the preclusive and liberating effects of the § 1983 judgment, it would not have emphasized that inevitability so frequently. Third, one could be sure that a court of appeals would choose its words carefully when concluding that the Supreme Court could not have meant what it unanimously held in Wolff. Fourth, "as a matter of judicial interpretation, it must

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[2]For understandable reasons, the Offet decision did not rest on any of the established abstention doctrines. Younger abstention and Colorado River abstention do not apply in the absence of a pending state proceeding. Hawaii Housing Authority v. Midkiff, 467 U. S. 229, 238-39 (1984); Colorado River Water Conservation District v. United States, 424 U. S. 800, 817-821 (1976). Pullman abstention and Burford abstention do not apply because the complaints do not present questions of state law which are difficult and unclear or which bear on policy problems of substantial public import. See Colorado River, 424 U. S. at 814.

always be preferable to adopt an interpretation of an opinion that maintains established precedents, where the [Supreme Court] itself has not overruled those precedents." Pavlidis v. New England Patriots Football Club, 675 F. Supp. 701, 703 (D.Mass. 1987). Even if Offet can be reconciled with Wolff, the defendants' interpretation of Offet would be inconsistent with the Supreme Court's reasoning in Wilwording v. Swenson, 404 U. S. 249, 251-52 (1971)(per curiam), and Patsy v. Board of Regents, 457 U. S. 496, 508 (1982). Because the Offet court did not find it necessary to distinguish either of these cases, this Court can only assume that the Offet decision was intended to be as consistent as possible with these precedents. Fifth, if the Eighth Circuit truly intends to open such a wide hole in § 1983, it should take more than a passing reference to federalism and comity to justify it.[3]

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[3]Considerations of comity and federalism obviously were important to the Offet panel; there is no other way to explain that court's readiness to subordinate Mr. Offet's interest in having his constitutional claim resolved in a federal forum. However, Congress enacted § 1983 in spite of objections that the law "ignores the state tribunals as unworthy to be trusted . . . ." Cong. Globe, 42d Cong., 1st Sess. App. 361 (1871)(remarks of Representative Swann of Maryland). See also id. at 49-50 (remarks of Representative Kerr of Indiana)(§ 1983 "is a covert attempt to transfer another large part of jurisdiction from the state tribunals, to which it of right belongs, to those of the United States"). Thus, as Justice Blackmun has noted, courts must be wary of those who would ask a court to restrict the usefulness of § 1983 by merely restating the objections of the outvoted congressmen:

> It is not enough to argue before a court that a particular construction of § 1983 is inconsistent with "principles of federalism" of "federal-state comity." To do so is to put the cart before the horse, for the only principles of federalism and comity that justify restricting the scope of § 1983 are those found in the Constitution or § 1983 itself. We must avoid the

II.

The Court must now decide whether a § 1983 judgment for each of the plaintiffs would "leave a state court no choice" but to expedite the release of each plaintiff in a subsequent post-conviction relief ("PCR") action.[4] In doing so, the Court will first assume for the sake of argument that the Offet panel's view of issue preclusion is correct, and ask whether other factors will make the prospect of expedited release remote rather than automatic. In Part III of this order, the Court will then consider whether the issue preclusive effect of the federal court's § 1983 judgment on a subsequent state post-conviction relief action is

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(Note 3 continued)

> temptation to let "federalism" become the Natural Law of the 1980's, a brooding omnipresence to which duly enacted statutes are made to pay homage.

Blackmun, § 1983 and Federal Protection of Individual Rights--Will the Statute Remain Alive or Fade Away? 60 N. Y. U. L. Rev. 1, 23 (1985). Justice Blackmun's view is entirely consistent with Supreme Court precedent. The Supreme Court frequently speaks of considerations of comity and federalism, but it has never relied solely upon them as a basis for denying relief under § 1983. A better reason was present in each case. See Younger v. Harris 401 U. S. 37, 46 (1971); Rizzo v. Goode, 423 U. S. 362, 380 (1976) (injunctive relief sought; irreparable injury requirement not satisfied due to available state remedy); Preiser v. Rodriguez, 411 U. S. 475, 489 (1973)(respect for congressional intent behind § 2254); Allen v. McCurry, 449 U. S. 90, 96 (1980)(Full Faith and Credit Statute); Fair Assessment in Real Estate Association v. McNary, 454 U. S. 100, 115 (1981)(§ 1983 suit would in every practical sense operate to suspend collection of state taxes, a result Congress intended to preclude under the Tax Injunction Act).

[4]Under Preiser v. Rodriguez, 411 U. S. at 487-88, the Court will treat a restoration of good-time credits as the equivalent of an expedited release, at least where the plaintiff has a release date which could be expedited.

really as automatic as the Offet court assumed it would be, and if not, whether this means an alternative is available to the Court which is better than those considered in Offet.

At this stage of the Court's analysis, two presumptions underlying the Offet decision are very important. The first presumption is that the § 1983 plaintiff will reach the merits as a petitioner in a subsequent PCR action. If the plaintiff cannot reach the merits, the opportunity to estop the State on a constitutional issue will not arise, and the existence of a prior § 1983 judgment for the petitioner should not affect the state court's decision. The second presumption is that the plaintiff could change the fact or duration of his confinement through a state court proceeding involving the same occurrence giving rise to the § 1983 suit. When that occurrence is a disciplinary action, the second presumption will usually--but not always--be true, and it is important to recognize when it is not.

In deciding whether these presumptions apply in each case, the Court must draw conclusions about what would happen in state court if it granted the stays requested. The defendants vigorously assert that this Court cannot conclude anything about state law, but must grant the stays in order to permit the questions of state law to be addressed "in the proper place and at the proper time." This argument appears to rest upon an analogy to the manner in which federal courts determine whether a habeas corpus petitioner has exhausted all available state remedies. In that setting, the federal court cannot presume that an avenue is unavailable under state law, but sometimes must send the

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petitioner back to state court to determine through trial and error whether the avenue is available. See, e.g., Feeney v. Auger, 808 F. 2d 1279, 1283 (8th Cir. 1986).[5]

This analogy is flawed because in habeas corpus cases, unlike these cases, it is already established that an exhaustion requirement applies, and the question before the court is whether the petitioner has complied with it. In these cases, the state law questions arise as this Court determines whether each case is an Offet case, i.e., whether any duty to exhaust exists. Properly framed, the question is whether this Court must wait to decide whether a plaintiff has a duty to exhaust under Offet until he exhausts, and grant an Offet stay in the meantime to ensure that he exhausts. Unsurprisingly, the answer must be no. To receive an Offet stay, the defendants as movants must prove that a § 1983 judgment would leave a state court with no choice but to expedite the release of the plaintiff. Until the defendants can satisfy that threshold requirement, this Court has no authority to require the plaintiff to go to state court.

Even if the Court were to frame the State's argument as a request for abstention rather than exhaustion, abstention would

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[5] Even under § 2254, exhaustion is not required where the possibility of state law relief is a matter of conjecture. "The exhaustion of state remedies should not be stretched to the absurdity of requiring the exhaustion of separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the alternatives is appropriate or effective." Wilwording, 404 U. S. at 250 (quoting Marino v. Ragen, 332 U. S. 561, 568 (1947)(Rutledge, J., concurring)).

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not be warranted. Pullman abstention would not apply because the state laws in question are not "obviously susceptible" of a construction which would render adjudication of a federal question unnecessary. Hawaii Housing Authority v. Midkiff, 467 U. S. at 237. If a state court were to rule that Iowa law prevents a PCR petitioner from reaching the merits, he would have a valid basis for lifting any Offet stay and the federal court would reach the merits of his constitutional claim. If a state court would reach the unlikely conclusion that Iowa law does not bar the plaintiff from reaching the merits, the state court would address the constitutional claim. With or without abstention, the consritutional issue persists.[6]

The Court cannot help but recognize the substantive consequence of adopting a more passive approach to this problem. If a section 1983 defendant can drive a plaintiff from federal court merely by establishing the possibility that state law would permit the plaintiff to estop the defendant on the merits in a subsequent state law proceeding, some plaintiffs will become lost in the shuffle between court systems. While this may arguably be what the defendants have in mind, it would transform a remedy which Congress intended to be simple and effective into a contraption reminiscent of the 19th

[6]Furthermore, this Court possesses the power to certify questions of Iowa law to the Iowa Supreme Court when requested by the parties. As the U. S. Supreme Court recently noted, abstention can be more cumbersome and problematic than certification. Virginia v. American Book Sellers Association, 56 U.S.L.W. 4113, 4117 (U.S. Jan. 25, 1988). If the defendants can persuade the Court that the validity of an Offet motion turns on a construction of an Iowa statute which is obviously susceptible of the limiting construction, the Court may use that avenue.

century English Court of Chancery.[7] This Court will avoid construing Offet in a way which would trap, wear out or confuse the undereducated and underrepresented plaintiffs who commonly bring actions of this sort.

If the plaintiffs in Goff v. Nix and Walton v. Nix were to prevail on the merits in this court and file a § 663A action seeking a restoration of good-time credits, they would encounter the three-year statute of limitations on § 663A actions. Under this statute, "all potential post-conviction applicants whose convictions became final prior to July 1, 1984 must file their applicants for postconviction relief on or before June 30, 1987 or be barred from relief." Brewer v. Iowa District Court, 395 N. W. 2d 841, 844 (Iowa 1986). The conviction Goff challenges in Goff v. Nix was entered on March 6, 1984, and under Brewer, his failure to file a § 663A action before July 1, 1987 would prevent him from reaching the merits if he prevails in a § 1983 action. Similarly, the disciplinary convictions which Walton challenges were entered in December 1983, so that a subsequent § 663A action would suffer

[7]The defendants' approach reminds the Court of Charles Dickens' slightly fictional portrayal of the Chancery at its worst:

> All through the deplorable cause everything that everybody in it, except one man, knows already, is referred to that one man who doesn't know it, to find out . . . . Equity sends questions to Law, Law sends questions back to Equity; Law finds it can't do this, Equity finds it can't do that . . . and we can't get out of the suit on any terms, for we are made parties to it, and must be parties to it, whether we like it or not.

C. Dickens, Bleak House 73 (1853).

the same fate. Therefore, the opportunity for preclusion will not arise, the rationale for Offet is inapplicable, and these actions will not be stayed.

Some of the constitutional violations alleged by Plaintiffs Brewer and Mahers would not warrant a restoration of good-time credits in a § 663A action. Brewer's § 1983 complaint, which was received prior to any disciplinary hearing, challenges the constitutionality of his lengthy confinement in summary segregation. The Iowa Supreme Court has held on two occasions that a prisoner cannot expunge a disciplinary conviction from his record in a § 663A action where the claimed rule violation concerns summary segregation rather than the disciplinary hearing. Baker v. State, 364 N. W. 2d 244, 245-6 (Iowa 1985); Kelly v. Nix, 329 N. W. 2d 287, 293 (Iowa 1983). This principle is somewhat analogous to the rule announced by the U. S. Supreme Court in Stone v. Powell, 428 U. S. 465 (1976), and rests upon a distinction between violations which do and do not impugn the integrity of the adjudication of guilt. Thus, a finding that the allegations in Brewer's complaint are true will not bring him any closer to a restoration of good-time credits, and the rationale of Offet is inapplicable to his case.

Mahers' case involves a vacated disciplinary conviction and a conviction on rehearing. He challenges actions during one or both of the hearings, as well as the constitutionality of the length of his disciplinary detention. It is very unlikely that Mahers could challenge the first hearing or the length of his detention on post-conviction. The first hearing would not impugn the integrity

of his conviction on rehearing, and a prisoner cannot use § 663A to expunge a conviction because of the unconstitutionality of the sentence. See Davis v. State, 346 N. W. 2d 97, 101 (Iowa 1984). However, it is possible that he could challenge his conviction on rehearing under § 663A. In other words, Mahers' § 1983 complaint contains a mixture of allegations, some of which provide a basis for a restoration of good-time credits. Plaintiff Burgin has also filed a mixed complaint which challenges disciplinary convictions. At least eight of his convictions are barred by the § 663A statute of limitations, and many others are not presently barred.

The Court thus must decide whether it should stay "mixed" complaints. At the very least, the plaintiffs are entitled to an opportunity to reframe their complaints. If the plaintiffs drop those claims which would be subject to Offet, or if they were to formally waive their right to proceed under § 663A or habeas corpus, or if they were to waive their rights to estop the State in any subsequent § 663A action,[8] no basis for an Offet stay would exist. Plaintiffs Mahers and Burgin will be granted the option of choosing between these approaches. The Court will only consider an Offet stay if the plaintiffs fail to elect one of the alternatives.

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[8] "The fundamental premise of the requirement that preclusion be pleaded and proved is that a party entitled to demand preclusion is also entitled to waive it." 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4405 at 32 (1981); Floyd v. Kellogg Sales Company, No. 87-5067, slip op. at 7-8 (8th Cir. March 4, 1988); Nevels v. Manlon, 656 F. 2d 372, 375-6 (8th Cir. 1981). As a means of avoiding an Offet stay, the availability of this option might seem counterintuitive, but it is perfectly consistent with the reasoning of Offet.

Plaintiff Brewer also contends that the second Offet presumption does not apply in his case because he is serving two life sentences. The Offet court feared the prisoners would estop the State on the basis of a § 1983 judgment and thereby alter the fact or duration of their confinement. Where an Iowa prison disciplinary decision is involved, the disciplinary detention resulting from the action is almost always over by the time any federal court considers its constitutionality, so that the only relief available to a court which might affect the fact or duration of confinement in prison is a restoration of good-time credits taken by the disciplinary committee.

Of course, good-time credits are of little value to a prisoner serving two life sentences. Under Iowa law, a prisoner with a life sentence is ineligible for parole, see Iowa Code § 902.1, and can expect to die in prison unless each such conviction is overturned or unless the governor commutes his sentence or sentences to a term of years. If Brewer's convictions are overturned, he will not need his good-time credits. Thus, a restoration of Brewer's good-time credits can only have the effect feared in Offet if the governor commutes his sentences.

The Court takes judicial notice of the fact that Mr. Brewer was most recently convicted of murdering the husband of a prison employee following an escape from the Iowa State Reformatory, where he was serving a life sentence arising from a 1963 murder conviction. State v. Brewer, 247 N. W. 2d 205, 208 (Iowa 1977). Needless to say, a commutation of his sentence would be most unlikely. For this reason, it would be absurd for the Court to

stay Brewer's § 1983 complaint out of fear that a judgment for Brewer in that case would be used to secure an earlier release, and an alternative basis for a denial of an Offet stay in his case exists.

Similarly, Plaintiff Charles Reese is serving a life sentence following a conviction for first-degree murder. The State's theory at Reese's trials was that Reese and two associates murdered Charles Sallis after Sallis' wife offered to pay anyone who killed him. See State v. Reese, 359 N. W. 2d 771 (Iowa 1977), aff'd on retrial, 301 N. W. 2d 693 (Iowa 1981). See also Reese v. State, 391 N. W. 2d 719 (Iowa Ct. App. 1986)(§ 663A proceeding). Mr. Reese has not exactly been a model prisoner at ISP. Before this Court in another case, he has admitted attacking an assistant warden, and a document he has filed in this case states that his date for release from isolation in administrative segregation into general population is March 5, 1996.[9] Like Brewer, Reese is not a realistic candidate for a commutation from the governor, and the number of good-time credits he has earned is largely academic. For these reasons, his § 1983 action will not be stayed.

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[9] In this circuit, "release" from non-punitive administrative segregation, unlike release from prison, is a form of relief which is available under § 1983 even after Preiser. See, e.g., Kelly v. Brewer, 525 F. 2d 394, 402 (8th Cir. 1985). It follows that this Court has no duty under Preiser to let a state court make the initial determination of whether to release Reese from administrative segregation, even if § 663A can also be used for that purpose.

III.

There is one case which is a true Offet case--Goff v. Dailey. This suit involves a recent disciplinary action, the plaintiff is not serving a life sentence, and if there would be a procedural obstacle which would prevent Mr. Goff from reaching the merits on a subsequent state post-conviction proceeding, the Court cannot see it. Thus, the Court cannot avoid addressing the questions which it raised in its briefing order--whether the Offet court may have overestimated the issue preclusive effect of a section 1983 judgment in a subsequent section 663A action, and if so, whether this Court can prevent preclusion in a way which would make it unnecessary to stay proceedings. The Offet panel believed that the section 1983 judgment would have an automatic preclusive effect, and further believed that the Supreme Court would have decided Wolff differently if it had more fully considered this effect. Just as the Offet court did not "lightly dismiss Wolff," 823 F. 2d at 1260, this Court does not lightly dismiss Offet. But when faced with the unfamiliar and uncomfortable task of choosing between a seemingly express holding of the Supreme Court and a panel decision of the Eighth Circuit, this Court does not believe that automatic adherence to the panel's premises is wise or necessary.

This Court examined relevant principles of issue preclusion in anticipation of a wave of Offet motions, and set out its preliminary impressions in the briefing order previously submitted to

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the parties so that the movants could find the flaws in this Court's reasoning prior to any ruling. The Court has seriously considered the defendants' responses, but continues to believe that a § 1983 judgment for a plaintiff will not necessarily have an issue preclusive effect in a subsequent § 663A proceeding, and that an alternative not considered in the Offet ruling would provide a solution to the Offet problem which is more justifiable than a stay.

"Federal law determines the effects under the rules of res judicata of a judgment of a federal court." Restatement (Second) of Judgments § 87 (1981); Deposit Bank v. Frankfort, 191 U. S. 499, 520 (1903). If a federal court presiding over a habeas corpus action would not give a § 1983 judgment issue preclusive effect, an Iowa court's duty to give federal judgments their federal law effect should compel the same result "in a like case and under similar circumstances." Stoll v. Gottlieb, 305 U. S. 165, 170 (1939). A state § 663A action and a habeas corpus proceeding are undoubtedly "like cases."

As the Supreme Court noted in Preiser, "principles of res judicata are, of course, not wholly applicable to habeas corpus proceedings." 411 U. S. at 497. Courts of appeals have been less equivocal when directly confronting the issue. As Judge Tuttle wrote in Hardwick v. Doolittle, 558 F. 2d 292, 295 (5th Cir. 1977), cert. denied, 434 U. S. 1049 (1978), "the doctrines of res judicata and collateral estoppel are not applicable in habeas proceedings." See also Johnson v. Lumpkin, 767 F. 2d 630, 636 (9th Cir. 1985)("it is axiomatic that res judicata is inapplicable

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in habeas proceedings."). Thus, in Warren v. McCall, 703 F. 2d 1183 (7th Cir. 1983), the Seventh Circuit noted that a prior judgment against a prisoner in a § 1983 action "is not res judicata" in a federal post-conviction relief action which involved identical issues. 709 F. 2d at 1184 n. 4. A different panel of the same court reached the same conclusion in Heirens v. Mizell, 729 F. 2d 449, 496 (7th Cir.), cert. denied, 469 U. S. 842 (1984).[10] While this Court can find conflicting dicta from other sources, see Wolff, 418 U. S. at 554 n. 12; Preiser, 411 U. S. at 511 (Brennan, J., dissenting); Huggins v. Isenbarger, 798 F. 2d 203, 207 (7th Cir. 1986)(Easterbrook, J., concurring), the Court cannot find a single case in which claim or issue preclusion was applied in a habeas corpus or PCR action.[11]

The two commercial law cases cited by the Offet majority were cases in which preclusion was invoked against the same party which lost the first action. However, the risk of this kind of preclusion is not present in any of the damages actions to which Offet might apply, because the proper defendants in a state PCR or habeas corpus action are not proper defendants in a § 1983 damages action. The proper defendant in a state PCR action in Iowa is the state itself, see, e.g., Lyon v. State, 404 N. W. 2d 580 (Iowa 1987). The only proper defendant in a § 2254 habeas corpus claim is a warden named in his official capacity, see, e.g., Nix v. Williams, 467 U. S. 431 (1985), and official capacity suits must be treated as suits against the state itself. Brandon v. Holt, 469 U. S. 464, 471-2 (1985). Any § 1983 claim for true damages against a state or a state official sued in his official capacity will fail because the state is immune under the Eleventh Amendment. Quern v. Jordan, 440 U. S. 332, 341 (1979); Alabama v. Pugh, 438 U. S. 781, 782 (1978). Thus, the respondent in a state PCR or habeas action will never have been liable to the petitioner for damages in a prior § 1983 damages action.

"The basic premise of preclusion is that parties to a prior action are bound and non-parties are not bound." Wright, Miller & Cooper, supra at § 4449. As one set of commentators has noted, "if the federal [§ 1983] suit were concluded first its findings would ordinarily not be conclusive on the state since the state usually will have been neither a party to that suit nor in privity with a § 1983 defendant." Developments in the Law--§ 1983 and Federalism, 90 Harv. L. Rev. 1133, 1347 (1977)("Developments").[12]

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[10] Offet involves the question of collateral estoppel (or issue preclusion), which is logically distinct from res judicata (or claim preclusion). However, traditionally the term "res judicata" has been used to describe both claim and issue preclusion, see Lawlor v. National Screen Service Corp., 349 U. S. 322, 326 n. 6 (1955), and that tradition survives in many judicial opinions. Thus, while the Warren and Heirens courts spoke only of res judicata, the context indicates that the cases presented questions of claim and issue preclusion.

[11] The Court recognizes that in Hardwick, Warren and Heirens, it was the state, rather than the inmate, which sought to invoke preclusion principles in a habeas corpus proceeding. However, there is nothing in any of these decisions which suggests that this was a decisive distinction.

[12] The defendants assert that privity between the state and its officials would permit issue preclusion in this context. However, courts have found that whatever privity exists between state officials and the state is not sufficient to preclude the non-party to the first action. See Garza v. Henderson, 779 F. 2d 390, 394 (7th Cir. 1985); cf. McCurry v. Allen, 688 F. 2d 581, 587 (8th Cir. 1982)(on remand from Supreme Court); Developments,

Thus, even if the Wolff court's "anticipat[ion]" that "normal principles of res judicata would apply" constitutes controlling authority on that issue, see 418 U. S. at 554 n. 12, normal principles of res judicata and collateral estoppel, when applied, do not require preclusion. An exception would be necessary.

The Supreme Court's ruling in Montana v. United States, 440 U. S. 147 (1979), if viewed in isolation, may provide an exception for a case such as Offet.[13] In Montana, the Supreme Court held that non-parties which assume control of the litigation in which they have a direct financial or proprietary interest can be estopped as if they were actual parties to that proceeding. 410 U. S. at 154-55. Because states commonly have a statutory or contractual duty to defend actions against state employees in federal court, see, e.g., Iowa Code § 25A.22 (1987), they might be

(Note 12 continued)
supra. The defendants also contend that offensive collateral estoppel would be available in this context. However, offensive collateral estoppel was found to be "clearly inappropriate" in McCurry v. Allen on remand because "the present defendants were not parties to the prior state court proceedings." Id. Even though "collateral estoppel can be invoked by a new defendant against a plaintiff who was a party to the former litigation . . . [i]t can never be used as a sword against a party who has not previously had his day in court." Whitley v. Siebel, 676 F. 2d 245, 248 n. 1 (7th Cir. 1982).

[13]However, it will take more than the risk of Montana-style estoppel to justify the recent extension of Offet to claims against city employees. In Turner v. Lockhart, No. 87-2120 (8th Cir. Oct. 2, 1987)(unpublished), a prisoner sued two police officers and the top corrections official in Arkansas, alleging that the police officers lied at his parole revocation hearing, the Parole Board's finding that he used intoxicants was unsubstantiated, and his requests to be given a breathalyzer or urine test were denied by prison authorities. Slip op. at 2. Despite the fact that any judgment against the police officers could not conceivably be used by Mr. Turner to estop the State of Arkansas, the same two-judge majority from Offet relied upon Offet to uphold the dismissal of Turner's entire § 1983 complaint.

vulnerable to Montana-style estoppel in any court which chooses to disregard Hardwick, Warren and Heirens.

However, this Court is presently persuaded that a court squarely confronted with a prisoner's attempt to estop the state in a section 663A proceeding would not permit the prisoner to invoke this exception. Preclusion law is "a growing, living, vital thing." A. Vestal, Res Judicata/Preclusion V-276 (1969). "[S]pecial flexibility is built into the rules that identify the parties who may be bound by a first decision or take advantage of it," Wright, Miller & Cooper, supra, at section 4426, and courts are permitted to reshape those rules in order to accommodate conflicting policy objectives. As the Supreme Court recently demonstrated in United States v. Mendoza, 464 U. S. 154, 160-64 (1984), the interests of a coordinate branch of government alone may be sufficient to overcome the efficiency interests which collateral estoppel is designed to advance. For this reason, the considerations of comity and federalism which helped to influence the Offet panel to reexamine and reinterpret the scope of section 1983 should apply with even greater force to the question of whether a section 1983 judgment against an official should estop the state in a PCR or habeas proceeding.[14] At the very least

[14]Some might be troubled by the thought that requiring a prisoner to relitigate the constitutional questions would unfairly prolong a confinement already found to be unconstitutional. However, in recent years the value of comity between state and federal courts has replaced the need to end unconstitutional confinements as the dominant interest in habeas corpus litigation. Compare Wainwright v. Sykes, 433 U. S. 72 (1977), with Fay v. Noia, 372 U. S. 391 (1963). For this reason, the Court believes that under present attitudes this delay would not be enough to require the use of collateral estoppel in a habeas proceeding.

this would seem to show that the kind of issue preclusion feared in Offet is neither inevitable nor automatic; rather, the availability of preclusion should depend upon how federal courts choose to reconcile competing policy objectives, and a strong argument can be made that the proper reconciliation of those interests would prevent preclusion.

During the Court's hearing on these motions, the defendants raised an alternative justification for Offet--the supremacy clause of the U. S. Constitution. Because state courts are bound by the supremacy clause to follow the federal Constitution as interpreted by federal courts, the defendants contend that a prisoner can invoke the supremacy clause to prevent a state court from reaching a decision in conflict with a prior federal decision arising from the same set of facts, even if issue preclusion is unavailable. This is a very attractive argument. However, the supremacy clause requires that federal law must be the supreme law of the land; that would not appear to preclude relitigation of factual issues. Even if this clause would prevent relitigation of legal issues, it should be remembered that a judgment for damages under section 1983 will add very little to the body of federal law. Under Harlow v. Fitzgerald, 457 U. S. 800, 818 (1982), and its progeny, a state official will only be liable for damages under section 1983 if he violated constitutional or statutory rights which were clearly established at the time of the violation. In such cases, the room for a state court judge to reach his own conclusions of law will be as limited prior to a section 1983 judgment as it would be after

such a decision, and the precedential effect of a section 1983 judgment for the plaintiff will merely be cumulative. Thus, the supremacy clause is an insufficient basis to require federal courts to wait until the state court has a chance to rule.

The defendants also contend that a prisoner who wins a section 1983 judgment will find it unnecessary to go to state court because the federal judgment will trigger an internal mechanism which provides equivalent relief. They contend that a disciplinary action which violates the constitutional standards for due process will also violate the prison's own "blue book" regulations. See Kelly v. Nix, 329 N. W. 2d 287, 293 (Iowa 1983). Under section III(G) of the Rules, Regulations and Disciplinary Procedures for Government of the Iowa State Penitentiary Inmates, disciplinary convictions entered in violation of these rules must be expunged unless certain exceptions apply. See Allen v. State, 418 N. W. 2d 67, 69 (Iowa 1988). Because this type of expungement will supposedly require the restoration of good-time credits and release from disciplinary lockup, they contend that habeas-type relief will automatically follow a successful section 1983 judgment, no matter what principles of issue preclusion would require.[15]

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[15]On the other hand, Plaintiff Brewer correctly notes that any violation by the prison of its "blue book" regulations is also a violation of the federal court order in Kane v. Brewer. See Kelly v. Nix, 329 N. W. 2d at 293. Thus, if the defendants are correct in their assertion that a disciplinary conviction in violation of the Due Process Clause is ipso facto a violation of the blue book, that conviction will also be a violation of the federal court order. If an Offet stay is entered under these circumstances, it will be impossible for federal courts to ensure compliance with a federal court order. The federalism concerns

Whatever merit this argument may carry in cases arising at the Iowa State Penitentiary, it has little to do with Plaintiff Goff's case, which arose at the Clarinda Medium Security Facility and involves First Amendment rights rather than due process rights. Because the defendants have not argued that the same self-correcting mechanisms operate at Clarinda, this theory cannot provide a sufficient basis to warrant a stay.

The Offet court apparently believed it was faced with only two alternatives--permitting plaintiffs to use section 1983 and risking issue preclusion of the state in a PCR or habeas corpus proceeding, or expanding the Preiser exception to section 1983 so as to foreclose the opportunity for preclusion from arising. This Court's review of collateral estoppel principles, coupled with the briefs and arguments of competent counsel, persuades it that a third alternative exists--permitting the plaintiff to use section 1983 while holding as a matter of federal law that any judgment against the defendants would not estop the State in a subsequent section 663A or habeas corpus action. Even if the Court were not persuaded that this alternative is available, it would not enter an Offet stay without first offering the plaintiff an opportunity to dispel the Offet court's fears by submitting a waiver of any right he may have to estop the State.

This Court prefers the third alternative with the waiver option because it is more narrow and more consistent with the

---

(Note 15 continued)
raised by this prospect should outweigh concerhs warranting a stay.

proper role of the courts in the law-making process than a judicially imposed exhaustion requirement. Congress has already decided which section 1983 plaintiffs must exhaust state remedies before proceeding in federal court, and has chosen to create a limited exhaustion requirement which is now codified at 42 U.S.C. 1997e. When Congress enacted section 1997e in 1980, it was aware of the burdens placed on the federal courts by section 1983 suits filed by state prisoners, and must have been aware of the Wolff decision six years earlier. Nevertheless, Congress did not "correct" Wolff, but instead chose a middle path.[16] This Court cannot overlook the Supreme Court's admonition in Patsy v. Board of Regents that "a judicially imposed exhaustion requirement would be inconsistent with Congress' desire to adopt section 1997e and would usurp policy judgments that Congress reserved for itself." 457 U.S. at 508.

The Offet court's goal of preserving the autonomy of state post-conviction proceedings is a noble one. But when that goal can be achieved either through a narrow clarification of judge-made law or by altering a balance struck by Congress, courts should always prefer the first approach, and leave it to Congress to adopt the second. Because the Court is persuaded that the first approach is in fact available, it denies the defendants'

---

[16]The defendants have not argued that section 1997e would require any of these plaintiffs to exhaust the certified state grievance procedure or state court remedies. The Iowa grievance procedure which was certified under section 1997e describes complaints about the disciplinary process and classification as "non-grievable complaints."

motion for an Offet stay in Goff v. Dailey and holds that as a matter of federal law, any judgment against the defendants in that action will not estop the state in a subsequent section 663A or habeas corpus proceeding.[17]

IV.

In its briefing order, the Court stated that it would look favorably upon any motions to certify the questions involved to the Eighth Circuit for interlocutory appeal under 28 U.S.C. 1992(b).[18] The Court also stated in that order that, in light of the number of actions conceivably subject to Offet and the possible need for clarification from the Circuit, such an appeal might well be permitted. Because other panels of the Eighth Circuit have not been as willing as the Offet panel to address these issues sua sponte,[19] many Offet stays may be denied or

[17]While it may seem premature to rule on the preclusive effect of a judgment before that judgment is even entered, see Teamsters Local 282 Pension Trust Fund v. Angelos, 762 F. 2d 522, 525 (7th Cir. 1985), the Offet panel could not have entered a stay if it shared that view. If it was not premature for the Offet court to find that a future section 1983 judgment in that case would have a preclusive effect, it cannot be premature for this Court to also address the issue and merely reach a different conclusion.

[18]During the consolidated hearing, the Court suggested that the Court of Appeals might address the Offet issues without the need for certification as parties appeal as of right from orders granting or refusing to grant equitable stays of legal actions. The rule which would have permitted such appeals, known as the Enelow-Ettelson rule, was formally abandoned by the Supreme Court last month. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 56 U.S.L.W. 4243, 4248 (U.S. March 22, 1988). Thus, it could be a long time before any litigant is in a position to challenge a denial or issuance of an Offet stay on an appeal as of right.

[19]See, e.g., Coleman v. Turner, 838 F. 2d 1004 (8th Cir. 1988); Freitas v. Auger, 837 F. 2d 806 (8th Cir. 1988); Glick v. Walker, 834 F. 2d 709 (8th Cir. 1988).

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granted before the Eighth Circuit is presented with all of the issues raised by the defendants' motions on an appeal from a final judgment.[20] By consolidating these cases for purposes of consideration of the Offet motions, the Court has made it unnecessary to address the Offet issues on a piecemeal basis, and an interlocutory appeal from this order has the same advantage. For these reasons, the Court reaffirms its willingness to certify these issues for interlocutory appeal upon a proper motion filed by the defendants.

IT IS THEREFORE ORDERED that the defendants' motions for stays are denied in the following actions: Goff v. Nix, Burgin v. Farrier, Brewer v. Henry, Mahers v. Nix, Reese v. Farrier, Walton v. Nix and Goff v. Dailey.

IT IS FURTHER ORDERED that the plaintiffs in Burgin v. Farrier and Mahers v. Nix shall inform the Court within two weeks of this order whether they intend to drop those claims which would be subject to Offet, formally waive their right to proceed under section 663A or habeas corpus on those claims, or waiver any rights to estop the State in any subsequent section 663A action.

May 6, 1988.

Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

[20]According to the Clerk of Court, thirty Offet stays have already been granted in the Southern District of Iowa.

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FILED

MAY 30 1990

ROBERT D. ST. VRAIN

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

89-1186/1187

Rick Dean Bressman,

Appellant,

vs.

Hal Farrier, et al,

Appellees.

Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc.

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

May 30, 1990

Order Entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

RESPONSE REQUESTED

ORIGINAL

NO. 90-5672

Supreme Court, U.S.
FILED
NOV 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICK BRESSMAN, No. 89-1186

Petitioner,

v.

HAL FARRIER, PAUL GROSSHEIM, CALVIN AUGER, JOHN SISSEL, PAUL GRETTEN, J. MANTERNACH, LARRY BRIMEYER, and MR. BUTCHER,

Respondents.

GEORGE GOFF, No. 89-1187

Respondent,

v.

CRISPUS NIX, HAROLD FARRIER, DEPUTY WARDEN HENRY, CO SPANGLER, CO ROONEY, CO MARSHALL, CO SEVERIN, CO DRUMMOND, CO STEVENS, CO FIELDS, CO DILKS,

Petitioners.

LAURENCE BURGIN, BIE

Respondent,

v.

HAL FARRIER, PAUL GROSSHEIM, CRISPUS NIX, RON WELDER, CHARLES HARPER, MARION WARE, JOHN SANDERS, RANDALL MARTIN, R.W. McVEIGH, JOHN LEWIS, A.K. ANDERSON, RICHARD McALLON, NEAL BREDING, CAPTAIN BRIDLE, J.R. GOETZ, GERALD DOLF, GEORGE FINN, LT. MITCHELL, PAUL SCHROCK, JOHN DEWEY, RICHARD LARKIN, GEORGE CLYMAX, RICK BARLOW, DONNELL PROUGH, LT. BIRDSELL, STEVE YOUND, KEVIN SELTON, LT. BARNARD, LT. CORWELL, JAMES RENNES, RAY OLSON, PAT McLAUGHLIN, BOB WASHINGTON,

Petitioners.

RECEIVED
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RONALD W. BREWER,

Respondent,

v.

JOHN HENRY, SARAH COATS, JAMES BURTON,

Petitioners.

CHARLES O. REESE,

Respondent,

v.

HAL FARRIER, CRISPUS NIX, PAUL HEDGEPETH,
JOHN HENRY, RON WELDER, CHARLES HARPER,

Petitioners.

CHESTER WALTON, JR.,

Respondent,

v.

CRISPUS NIX, CHARLES HARPER,
LT. SHIP, RONALD WELDER,

Petitioners.

AFFIDAVIT OF MAILING

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI

I, Gordon E. Allen, a member of the Bar of this Court, being first duly sworn upon oath, depose and state that on the 16th day of November, 1990, I mailed an envelope addressed to the Clerk of the Supreme Court of the United States, One First Street, N.E. Washington, D.C. 20543, first-class postage prepaid, containing the original and twelve ( ) copies of Respondent's sistance to Petition for Writ of Certiorari in the above entitled case.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

NO. 90-5672

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October Term, 1990

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CERTIFICATE OF SERVICE

I, Gordon E. Allen, a member of the Bar of this Court, hereby certify that on the 16th day of November, 1990, one copy of Respondent's Resistance to Petition for Writ of Certiorari was mailed first-class postage prepaid, to Philip B. Mears, MEARS, ZIMMERMANN & MEARS, 209 East Washington Street, Paul-Helen Building, Suite 230, Iowa City, Iowa 52240, counsel of record for petitioners herein. I further

certify at all parties required to be served have been served.

Respectfully submitted,

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CRISPUS NIX, CHARLES HARPER,
LT. SHIP, RONALD WELDER,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

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STATEMENT OF THE CASE

The State of Iowa adopts Petitioner's statement of the case.

SUMMARY OF ARGUMENT

The Petitioner seeks a writ of certiorari be issued to review two claims. First, whether the Federal courts have jurisdiction to entertain claims under 42 U.S.C. § 1983 challenging prison discipline if the prisoner is not seeking restoration of good time credits as part of requested relief. Second, whether the prisoner challenging prison discipline should have his claim in Federal court dismissed if a state procedural default prevents him from litigating his claim in the state court on the merits.

The Eighth Circuit has not closed the Federal courthouse door to prisoners seeking remedy for violation of their constitutional rights in disciplinary proceedings. More importantly, the Eighth Circuit opinion in this case does not differ from the many other decisions which have construed Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct 2963, 41 L.Ed.2d 935 (1974); Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). While the language and nomenclature may differ, there is no conflict among the circuits. It is the result which remains consistent.

ARGUMENT

REASONS FOR DENYING THE WRIT

The Decision in the Circuit Court Has Not Closed the Door to the Federal Courthouse And Is Not Inconsistent With Current Federal Law.

The Eighth Circuit decision in this case and in prior decisions in Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987) and Jones v. Smith, 835 F.2d 175, (8th Cir. 1987) do not close the door to inmates seeking Federal court review of their prison disciplinary hearings and loss of good time. Petitioners assert that a state decision on the merits may preclude the inmate from relitigating in Federal court. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Prisoners should be bound by the same rules as other litigants. The doctrines of res judicata and issue preclusion were not developed in order to keep prisoners out of Federal court. The same principles allow a prisoner who wins in state court to return to Federal court having exhausted his remedies and utilize the doctrine of issue preclusion in a damage action.

Plaintiff suggests that the Iowa courts are not available to prisoners as there are procedural hurdles including a lack of jurisdiction where a person has not taken internal administrative appeals [Aschan v. State, 446 N.W.2d 791 (Iowa 1989)], and procedural default where a person has not raised particular constitutional claim on administrative appeals. [Bonds v. State, 447 N.W.2d 135

(Iowa 1989)]. These are not "insurmountable hurdles" as petitioner suggests. They are easily met in literally hundreds of cases each month. Petitioners' suggestion that the Iowa Legislature has recently eliminated review by the Supreme Court is not wholly accurate. The Iowa Supreme Court now reviews the district court decisions on petition for writ of certiorari, rather than appeal. 1990 Iowa Acts, 73rd G.A., Ch. 1043 § 1. Neither is this requirement a barrier to Federal court access.

The Eighth Circuit Decision in This Case Is Not Inconsistent With Supreme Court Precedent Nor Does it Conflict With Decisions in Other Circuits Which Have Interpreted That Precedent.

There has been much discussion in the circuits about the interplay between Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) and Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct 2963, 41 L.Ed.2d 935 (1974). There is no disagreement that Preiser v. Rodriguez holds that an inmate who attacks the length of confinement and is seeking restoration of good time credits, must utilize a petition for habeas corpus pursuant to 28 U.S.C. § 2254 and must exhaust state remedies. The dialogue in the circuits has been generated by the language in Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct 2963, 41 L.Ed.2d 935 (1974) which discusses the requests for declaratory relief and damages.

The Court found that Preiser expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good time credits is sought in state proceedings, and that a declaratory judgment as a predicate to a damage award would not be barred by Preiser. The Court then found that only an injunction restoring good time improperly taken is foreclosed. Wolff, 418 U.S. at 554-554.

As the court in Preiser indicated, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983. 411 U.S. at 490, 93 S.Ct. at 1836, 36 L.Ed.2d at 450. The court held that

> Since the internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not being bypassed in the correction of those problems. . . . The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the states the first opportunity to correct the errors made in the internal administration of their prisons.

Id., at 492, 93 S.Ct. at 183, 36 L.Ed.2d at 452. Thus the court in Preiser clearly made habeas corpus the exclusive remedy to seek the restoration of good time lost as a result of prison disciplinary hearings.

The Eighth Circuit formulated a rule in Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987) that was based upon this ruling.

> Because a prisoner wins a § 1983 action in Federal court for damages or declaratory relief for the unconstitutional deprivation of good time credits thereby establishing an irrefutable claim for early or immediate release under habeas, we hold that in such a case the Federal court should stay the § 1983 claim until the plaintiff has satisfied the exhaustion requirement with respect to the underlying constitutional issue.

823 F.2d at 1258. This is the rule followed in the cases before the court. It does not conflict with Preiser and Wolff.

Wolff was a class challenge to a system of discipline. Wolff upheld the circuit decision to treat requests for restoration of good time as habeas. 418 U.S. at 554. What went forward was not a challenge to individual discipline but a challenge to the system. See, Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112 (5th Cir. 1987); Alexander v. Ware, 714 F.2d 416 (5th Cir. 1983).

Bressman presents a challenge to individual decisions not a class challenge to a disciplinary system. Wolff said

> Preiser expressly contemplated that claims properly brought under § 1983 would go forward while actual restoration of good time credits is sought in state proceedings. [citing Preiser v. Rodriguez, 411 U.S. at 499 n.14]

Wolff, 418 U.S. at 554.

Beyond the class challenge to the system in Wolff, the court did not elaborate on what kinds of cases were properly brought under § 1983. Obviously, under Preiser, the cases "not properly brought under § 1983" if the exclusive remedy is habeas. The threshold determination is the nature of the claim and the effect of the Federal court remedy.

Courts which have examined Preiser and Wolff have differed in the terminology used to determine whether the case was properly habeas corpus or civil rights, but the results are uniform in their analysis. Some have looked at whether the court looks at the core of the complaint or the effect of a Federal judgment. Mack v. Varelas, 835 F.2d 995 (2nd Cir. 1987); Williams v. Ward, 556 F.2d 1143 (2nd Cir. 1987); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983); Hadley v. Warner, 753 F.2d 514 (6th Cir. 1985); Hansen v. Heckel, 791 F.2d 93 (7th Cir. 1986); Crump v. Lane, 807 F.2d 1394 (7th Cir. 1986); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987); Jones v. Smith, 835 F.2d 175 (8th Cir. 1987); Young v.Kenny, 887 F.2d 237 (9th Cir. 1989); Ybarra v. Rhino Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984); Parkhurst v. State of Wyoming, 641 F.2d 775 (10th Cir. 1981); Gwin v. Snow, 870 F.2d 616 (11th Cir. 1989). Some have framed their analysis in terms of single hearing versus systems challenge. Alexander v. Ware, 714 F.2d 416 (5th Cir. 1983) (challenge to a single allegedly defective hearing must be viewed as habeas regardless of the nature of

the relief sought while broad due process challenges to a disciplinary system present challenges to conditions of confinement). Cf. Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112 (5th Cir. 1987) (challenge to a single parole board hearing must be exhausted through habeas corpus but even broad based claims which might entitle one or more claimants to immediate or early release must also be exhausted). One has used a "manner versus outcome" approach. Georgevich v. Strauss, 772 F.2d 1078 (3rd Cir. 1985) (class action challenge to parole procedures proper under 1983 where challenge is to the manner by which prison authorities reached decision not the outcome of their decision). The common thread however is that cases which involve conditions of confinement are not subject to the exhaustion requirement while claims which affect the fact and duration of confinement must follow habeas. See Preiser v. Rodriguez, 911 U.S. at 499-500 n.14, 93 S.Ct. at 1827 n.14, 36 L.Ed.2d n.14. The Eighth Circuit in Bressman did not require exhaustion of claims which did not involve the deprivation of good time credits. This is consistent with decisions from other circuits. Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983) ($ 1983 action will lie if the prisoner has already been released from custody); Gwin v. Snow, 870 F.2d 616 (11th Cir. 1989) (equal protection claim will not lessen the duration of his sentence).

Only one panel has made a decision that the relief requested in the complaint determines whether a claim must be exhausted pursuant to the habeas corpus statute. Viens v. Daniels, 871 F.2d 1328 (7th Cir. 1989); cf. Hansen v. Heckel, 791 F.2d 93 (7th Cir. 1986) and Crump v. Lane, 807 F.2d 1394 (7th Cir. 1986). One panel of the Eleventh Circuit has criticized prior decisions of the Fifth and Eleventh Circuits which found that the mere assertion of damages rather than release was insufficient to distinguish a civil rights case from a habeas corpus case. Gwin v. Snow, 870 F.2d 616 (11th Cir. 1989). The court in Gwin, however, held that even under prior authorities the plaintiff did not need to exhaust his claim as the effect of a Federal court judgment would not lessen the duration of his sentence. Finally, in Monk v. Secretary of the Navy, 793 F.2d 364 (D.C. Cir. 1986). The Circuit found a distinction between a challenge which would affect the underlying conviction as opposed to a challenge to an administrative action unrelated to his conviction. That court held that because the claim affected the underlying conviction, state remedies must be exhausted pursuant to habeas corpus. Only in this analysis arguably conflicts with the holding in Preiser and he Eighth Cirucut here that habeas corpus would be the exclusive remedy for attacks on the fact or length of confinement, regardless of whether a claim arose as a result

of a criminal conviction or as a result of extension of sentence because of the adjustment of good time credits.

The appellate courts have on many occasions considered "the ambiguous borderline between habeas corpus and § 1983." Offet v. Solem, 823 F.2d at 1256. The results however are fairly predictable in spite of the differences in analysis and no real conflict in the circuits is apparent.

Certiorari Should Not Be Issued to Review Whether a Prisoner Challenging Prison Discipline Should Have His Claim in Federal Court Dismissed If a Procedural Default Prevented Him From Litigating in the State Court on the Merits.

Petitioner argues that the holding in the Bressman case imposes a complete exhaustion requirement on prisoners contrary to established United States Supreme Court precedent in Patsy v. Board of Regents, 457 U.S. 496, 102 S.Ct. 2257, 73 L.Ed.2d 172 (1982). Bressman is reconciled with Patsy in that only those claims which result in direct or indirect challenge to the fact or duration of confinement must be characterized as habeas corpus claims. Once that decision is made based on the nature of the case, there is no choice; habeas is the exclusive remedy and the claim is not "properly brought under § 1983". Preiser, 411 U.S. at 499 n.14, 36 L.Ed.2d at 439 cited in Wolff, 418 U.S. at 554, 41 L.Ed.2d at 950.

Once exhaustion is required, it is obvious that the court must have a doctrine which prevents an inmate from deliberately avoiding state remedies in order to litigate

the claim in Federal court. See, Fay v. Noia, 372 U.S. 391, 433, 82 S.Ct. 822, 846, 9 L.Ed.2d 837 (1963). Once the determination is made that a case should proceed through habeas corpus, it is not surprising that the court would use habeas corpus analysis to determine if a petitioner had a legitimate reason for by-passing state procedures. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 rhg. denied 434 U.S. 880, 98 S.Ct. 241, 54 L.Ed.163 (1977).

CONCLUSION

Petitioner has not met the requirements of the Supreme Court Rule 10. In the 16 years since Preiser and Wolff, the appellate courts have fairly consistently applied Preiser and Wolff to preserve a Federal forum for those claims which challenge the conditions of confinement or requiring those claims which affect the fact or duration of confinement to follow habeas corpus procedures. Bressman merely emphasizes that challenge to prison discipline where good time credits are lost are habeas corpus claims and those doctrines regarding exhaustion of remedies will be applicable.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

RICK DEAN BRESSMAN ET AL.

90-5672 *v.*

HAL FARRIER ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT H. YOUNG

90-5854 *v.*

PHYLLIS KENNY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 90-5672 AND 90-5854. Decided February 25, 1991

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting from the denial of certiorari.

These petitions raise the questions whether the exhaustion requirement of 28 U. S. C. § 2254 applies when state prisoners, in a suit under 42 U. S. C. § 1983, challenge the duration or conditions of their confinement but seek only damages or declaratory relief. The Eighth Circuit held here that exhaustion is required for § 1983 actions which include challenges to the conditions, as well as to the length or duration, of confinement. 900 F. 2d 1305, 1308 (1990). See also *Offet* v. *Solem*, 823 F. 2d 1256 (CA8 1987). The Seventh Circuit has adopted the contrary position. See *Viens* v. *Daniels*, 871 F. 2d 1328, 1333-1334 (1989). The Ninth Circuit held here that exhaustion is required for § 1983 actions seeking damages, so long as the requested relief requires as its predicate a determination that a prisoner's sentence is invalid or unconstitutionally long. 907 F. 2d 874, 876 (1990). Although no Court of Appeals has held to the contrary, several have recognized the apparent tension between this position

and the decisions of this Court in *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), and *Wolff* v. *McDonnell*, 418 U. S. 539 (1974). See, *e. g.*, 907 F. 2d, at 877; *Viens*, *supra*, at 1333; *Gwin* v. *Snow*, 870 F. 2d 616, 623 (CA11 1989).

Because of the confusion and divergence of opinion these issues have generated in the Courts of Appeals, and the fact that this Court has not ruled definitively upon the issues presented, I would grant certiorari in these two cases.